1879
11-622
Field
April 15th

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 264.

BAR ASSOCIATION

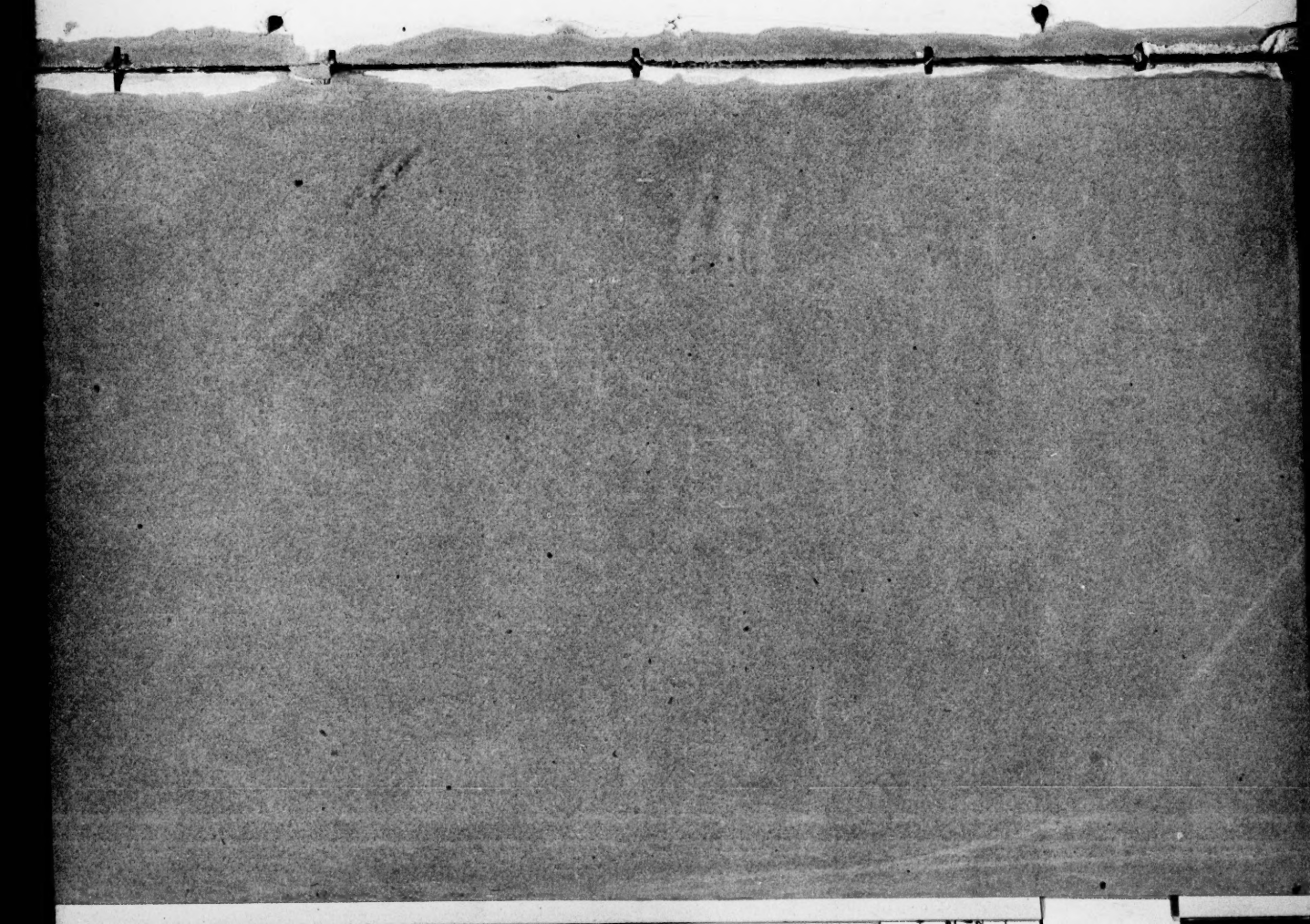
CHARLES JONES, ASSIGNEE OF THE NEW YORK KEROSENE OIL COMPANY, APPELLANT,

vs.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 10, 1877.



SUPREME COURT OF THE UNITED STATES.

No. 264.

CHARLES JONES, ASSIGNEE OF THE NEW YORK KEROSENE OIL COMPANY, APPELLANT,

VS.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Order granting leave to file bill in equity	1	1
Bill of complaint	3	2
Answer	20	11
Testimony of Charles Jones	34	18
Jordan M. Fowler	37	20
Thomas M. Cozzens	98	55
Francis H. Cozzens	110	62
James E. Kelly	121	68
Jordan M. Fowler (recalled)	133	75
Samuel D. Babcock	145	82
James P. Wallace	150	85
William Allen Butler	182	104
James P. Wallace (recalled)	185	105
Jordan M. Fowler (recalled)	194	110
John W. Marden	216	122
Charles Jones	230	130
James P. Wallace (recalled)	264	132
John W. Marden (recalled)	237	134
COMPLAINANT'S EXHIBITS.		
Certificate of incorporation of New York Kerosene Oil Company, A	241	136
Petition in bankruptcy of New York Kerosene Oil Company, B	243	138
Adjudication in bankruptcy of New York Kerosene Oil Company, C	259	147
Appointment of assignee of New York Kerosene Oil Company, D	260	147
Assignment of bankrupt's effects, E	261	148
Certificate of acknowledgment of mortgage, I	262	149
Losses on shipments of oil	264	149
Losses on shipments of naphtha	264	150
Profits on shipments of naphtha	266	150

DEFENDANT'S EXHIBITS.

	Original.	Prin
Letter of A. M. Cozzens to New York Guaranty and Indemnity Company, 1, January 22, 1873	267	150
Ledger balances from January, 1867, to December, 1867, inclusive, marked 1 to 13, January 23, 1873	268	151
Bill of Barney, Butler & Parsons, A, January 23, 1873	286	159
Notes and bills payable, No. 1, January 28, 1873	287	160
Mortgage, A, February 4, 1873	289	164
Bond, B, February 4, 1873	294	166
Storage receipt, C, February 4, 1873	296	167
Invoice, D, February 4, 1873	296	168
Notes, E and F, February 4, 1873	297	168
Agreements, G, H, I and K, February 5, 1873	299	169
Extracts from register of advances, &c., L and M, February 12, 1873	304	173
Consent of stockholders, exhibit, February 5, 1873	305	175
Resolution to execute mortgage, A, January 24, 1873	306	175
Book of minutes of New York Kerosene Oil Company, No. 1, January 28, 1873	307	176
Opinion, Benedict, J	326	188
Substitution of defendant's attorneys	334	193
Final decree	336	194
Notice of appeal to circuit court	341	196
Petition of appeal to circuit court	342	197
Bond for costs and damages on appeal	345	199
Minutes of circuit court	349	201
Findings of fact	351	201
Opinion of circuit court	363	207
Decree of circuit court	387	212
Petition of appeal to United States Supreme Court	405	215
Bond on appeal	419	218
Clerk's certificate	426	219
Waiver of citation	427	220

a Circuit court of the United States for the eastern district of New York, in the second circuit. In equity.

CHARLES JONES, AS ASSIGNEE OF THE NEW York Kerosene Oil Company, complainant and respondent,
vs.
THE NEW YORK GUARANTY AND INDEMNITY Company, defendant and appellant.

CASE ON APPEAL

E. A. Carley, solicitor for compl't and resp't.
Butler, Stillman & Hubbard, solicitors for def't and appell't.

b At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court rooms in the city of Brooklyn, on the 28th day of September, in the year of our Lord one thousand eight hundred and sixty-nine: Present, the honorable Charles L. Benedict, district judge.

CHARLES JONES, AS ASSIGNEE OF THE NEW York Kerosene Oil Company,
vs.
THE NEW YORK GUARANTY AND INDEMNITY Company. } In equity.

The above-named assignee of the New York Kerosene Oil Company appears by his attorney, E. A. Carley, esq., and files his bill of complaint against the New York Guaranty and Indemnity Company in the words and figures following, to wit:

1 In the circuit court of the United States for the eastern district of New York, second circuit.

Before the Hon. Samuel Nelson, circuit judge. In vacation, Sept. 23rd, 1869.

In the matter of the petition of the New York Guaranty and Indemnity Company for a reversal of the decision of the U. S. district court, in re The New York Kerosene Oil Company, bankrupt corporation, &c.

Upon the petition of the New York Guaranty and Indemnity Company in this matter filed January 13th, 1869, and the papers and proceedings therein referred to, and the order to show cause thereon granted January 13th, 1869, and the affidavit of Charles Jones, sworn January, 1869, William Allen Butler, esq., having been heard on behalf of said petitioner, and Benjamin F. Tracy, esq., on behalf of the assignee of said bankrupt corporation, and the said matter having been fully considered:

It is ordered and decreed that the said Charles Jones, assignee of said bankrupt, have leave, at any time within twenty days after the entry of this order, to amend his said petition to the said district court referred to in the said petition of The New York Guaranty and Indemnity Company, so as to make the same a bill in equity instead of a petition

2 for summary relief, and to file the same so amended, and upon the filing of such bill and service of a copy thereof and of this order upon the attorneys of the said The New York Guaranty and Indemnity Company in this matter, that said last named corporation plead or answer thereto within and according to the practice of said district court, and that so much of this order made in this matter January 13th, 1869, as restrains all proceedings of the said district court upon the said petition of the said Jones, be so far modified as to allow said court to proceed upon said bill according to the course and practice of said court in suits in equity.

And it is further ordered that the said The New York Guaranty and Indemnity Company, its officers, agents, and attorneys be, and they hereby are, restrained and enjoined, pending said suit in equity in said district court, from taking any further proceedings in the action referred to in their said petition, and now pending in the supreme court of the State of New York.

And it is further ordered that so much of the order of said district court entered on the 24th day of November, 1868, as requires the said The New York Guaranty and Indemnity Company to answer said petition of Jones, assignee, as heretofore filed, and all other orders or parts of orders and proceedings in this case inconsistent with this order be, and they are hereby, vacated and set aside.

S. NELSON.

A true copy.
[L. S.] CHAS. W. NEWTON,
Clerk.

(Endorsed:) Certified copy of order. Filed Sept. 27th, 1869. Filed with clerk of district court Sept. 28th, 1869.

3 To the honorable the judge of the district court of the United States for the eastern district of New York:

Your complainant, Charles Jones, respectfully shews that heretofore, to wit, on the thirteenth day of October, one thousand eight hundred and sixty-eight, your complainant filed in this court his petition in the matter of The New York Kerosene Oil Company, a bankrupt corporation, then pending in this court, in which said petition the facts hereinafter stated were stated, and the relief hereinafter demanded was demanded; that thereupon such proceedings were had that The New York Guaranty and Indemnity Company, hereinafter named, was ordered to answer the said petition, and thereupon and upon the petition of said New York Guaranty and Indemnity Company, asking a review of said order, such proceedings were had in the circuit court of the United States for said district that it was, by said circuit court, among other things, ordered that your complainant have leave within twenty days after the entry of said order of said circuit court to amend his said petition so as to make it a bill in equity, and to file the same as a bill in equity, and that thereupon a copy of the same be served upon the said New York Guaranty and Indemnity Company, and that said last-named corporation answer the same; all of which will more fully appear by said order and the other proceedings here in court, to which, for greater certainty, your complainant craves leave to refer.

Wherefore, and in pursuance of the leave so given him as aforesaid, your said complainant showeth as follows:

That heretofore, to wit, on the 30th day of May, in the year eighteen hundred and sixty, and thereafter continuously until the time of the

filing of this bill of complaint, there has existed a corporation
4 duly organized and established under the laws of the State of New York, under the corporate name of "The New York Kerosene Oil Company"; that said corporation was authorized by the laws under which it was organized to take and hold such real estate within the State of New York as might be required for the purpose of carrying on the business for which it was organized; that in pursuance of said authority the said corporation, on or about the 28th day of July, eighteen hundred and sixty, purchased and became the holder and owner in fee of all the real estate situated in county of Queens and State of New York hereinafter described, and continued to hold and own the same until the same was assigned and conveyed to this complainant, as hereinafter stated, said real estate being described as follows:

All those certain pieces or parcels of land lying together situate in the town of Newtown, county of Queens and State of New York, which, taken together, are bounded and described as follows, that is to say: Beginning at a stake at the intersection of the division line between land lately belonging to Helenah Kowenhoven and land lately belonging to the heirs of Agnes Pine, deceased, with the centre line of a street one hundred feet wide laid out or to be laid out, which centre line of such street measured on such division line is distant six hundred and sixty-seven feet easterly from the edge of the meadow on Newtown Creek as such meadow formerly was, and running thence southeastwardly along the centre line of such street laid out or to be laid out four hundred and twenty-one feet and two inches more or less to the northerly line of land now or late of Orsamus Bushnell, formerly of Paul Rapelye, thence southwesterly along such last-mentioned land six hundred and five feet three inches to the edge of the meadows, as formerly existing, thence continuing on the same course to the New-
5 town Creek, thence northwardly along Newtown Creek three hundred and twenty-seven feet and nine inches more or less to the division line between the land late of Helenah Kowenhoven and land late of the heirs of Agnes Pine, deceased, and thence northeastwardly along such division line eight hundred and sixty feet more or less to the place of beginning; together with the right to the land under water in Newtown Creek in front of the above-described premises, and all the water right and privileges to the said premises belonging or in anywise appertaining.

And also all that triangular piece of land situated at Du'ch Kills, in Newtown, Queens County and State of New York, and bounded as follows: Beginning at a point on the easterly side of Newtown Creek adjoining land heretofore conveyed by Neziah Bliss and Samuel Sneden and their respective wives to Erastus W. Smith and late of the North American Kerosene Gas Light Company, running thence northeasterly along the said land late of the said company to a point where the same is intersected by the centre line of First street as said street is laid down on a certain map filed in the clerk's office of Queens County, entitled "Map of the farm of Francis and Eve Duryea, situated on the Newtown and Dutch Kills Creeks, in Newtown, Queens County, as surveyed and a portion thereof laid out into lots for Neziah Bliss and Samuel Sneden by Van Alst and Meserole, city surveyors, May, 1856;" thence westerly along the centre line of said street to the easterly side of Newtown Creek, and thence southerly along Newtown Creek to the place of beginning; together with the right to the land under the waters of Newtown Creek in front of said last-described premises.

That on the fifteenth day of June, eighteen hundred and sixty-eight,

the said corporation presented its petition to the judge of the district court of the United States for said eastern district of New York,
6 under the act of Congress establishing a uniform system of bankruptcy, passed on the second day of March, 1867, to be declared a bankrupt; and such proceedings were thereupon had that on the sixteenth day of said June, said corporation was adjudged and declared a bankrupt by a decree of said district court; and that thereafter and on the 8th day of September last, your complainant was duly appointed the assignee in bankruptcy of said corporation, whereupon your petitioner accepted said trust and duly qualified therefor according to the requirements of said act of Congress; and that on the eighth day of said September, by a deed of assignment and conveyance, executed in the form and manner provided by said *said* act of Congress, all the property, real and personal, of the said corporation, including the real estate aforesaid, became and was conveyed to and vested in your complainant as such assignee in bankruptcy; and that thereupon your complainant entered upon the said real estate and now holds possession thereof as the assignee in bankruptcy of said corporation.

And complainant further says that a certain corporation, located and having its place of business in the county of New York, in the southern district of New York, entitled "The New York Guaranty and Indemnity Company," created and existing by virtue of a law of the State of New York, passed on the 13th day of April, in the year eighteen hundred and sixty-four, entitled "An act to incorporate the New York Guaranty and Indemnity Company," claims to have some interest in or lien upon said real estate, by virtue of a certain alleged mortgage thereof, purporting to have been executed on the 29th day of April, 1867, on behalf of said bankrupt corporation, and under its corporate seal, by Abraham M. Cozzens, then its president, and George W. Austin, then its secretary, a copy of which and of the certificates of the acknowledgement and registration thereof is hereto annexed, marked A;
7 that the claim of interest thus made by said New York Guaranty and Indemnity Company in and upon said real estate is adverse to the claim and interest upon and in the same of your complainant as such trustee in bankruptcy as aforesaid; that said "The York Guaranty and Indemnity Company," on or about the 10th day of October current, commenced an action against your complainant in the supreme court of the State of New York, by service upon your complainant of summons and complaint, wherein it is alleged among other things that said mortgage is a valid and subsisting mortgage and lien upon said real estate as security for a loan of one hundred thousand dollars made by said The New York Guaranty and Indemnity Company to said bankrupt corporation, and wherein the said New York Guaranty and Indemnity Company demand against your complainant and the other defendants named therein, among other relief, that the said mortgage be established and adjudged a valid and prior lien upon said real estate, and that the said bankrupt corporation be adjudged to be indebted to said New York Guaranty and Indemnity Company in said sum of one hundred thousand dollars and interest, and that your complainant and said other defendants be barred and foreclosed of all their right, claim, lien and equity of redemption therein, and that said premises be sold under the order of said supreme court for the purpose of foreclosing said mortgage and paying said alleged debt.

That the said New York Guaranty and Indemnity Company has also served upon this complainant a notice that upon the said complaint and

other papers, it will move the said supreme court for the appointment of a receiver of said premises pending said action.

That this complainant has not appeared in said action nor submitted himself or the subject matter thereof to the jurisdiction of said supreme court.

And complainant further says, upon his information and belief, that said alleged mortgage is not and never was a valid
8 and subsisting mortgage or lien upon said real estate; that in and by the laws of the State of New York, under which said bankrupt corporation was organized, it was prohibited from making any mortgage of or giving any lien upon said real estate, provided, however, that by and under said laws it was authorized to mortgage its said real estate to secure the payment of debts contracted by it in the business for which it was incorporated, the written assent thereto of the stockholders owning at least two-thirds of its capital stock having been first filed in the office of the clerk of the county where such real estate is situated; that said mortgage was not made and executed in the form and manner nor for the purpose authorized by said laws, nor was the same made by or with the consent of the said bankrupt corporation; and that the said Abraham M. Cozzens and George W. Austin had in fact no authority to make and execute the same in the name or under the seal of the said bankrupt corporation, nor was the said mortgage made to secure the payment of any debt contracted by said bankrupt corporation in the business for which it was incorporated, and that the written assent of its stockholders owning at least two-thirds of its capital stock was not given to the making of said mortgage, nor filed in the office of the clerk of said county of Queens before the execution thereof.

And that if it shall be made to appear that said mortgage was given to secure any debt due or owing from the said bankrupt corporation to said New York Guaranty and Indemnity Company, that the same, if any, is a debt provable against the estate of the said bankrupt in said proceedings in bankruptcy.

And complainant further says, upon information and belief, that said mortgage was in fact given to said New York Guaranty and Indemnity
9 Company to secure a certain bond of the said Abraham M. Cozzens, referred to in said mortgage, a copy whereof is hereto annexed marked B; and that said New York Guaranty and Indemnity Company has never loaned or advanced to the said bankrupt corporation any money upon the security of said mortgage, nor has any money advanced by the said New York Guaranty and Indemnity Company to said Cozzens upon the security thereof ever come to the hands and possession of said bankrupt, or of your complainant as assignee.

And complainant further says that said New York Guaranty and Indemnity Company was not, at the time of the transactions aforesaid, authorized by law to receive or retain interest on any loan of money made by it at a larger rate than seven per centum per annum, and upon information and belief he says that upon the loan to said Cozzens for which said bond and mortgage was given as aforesaid, it did retain and receive interest at a much higher rate than seven per centum, to wit, at the rate of sixteen per centum per annum, and that the sum due, if any under said bond, is much less than said sum of one hundred thousand dollars, and that said bond and mortgage are invalid, usurious, and void.

And complainant further says, upon information and belief, that the said bankrupt corporation after the execution and registering of said alleged mortgage contracted debts to a large amount, exceeding

the said corporation presented its petition to the judge of the district court of the United States for said eastern district of New York,
6 under the act of Congress establishing a uniform system of bankruptcy, passed on the second day of March, 1867, to be declared a bankrupt; and such proceedings were thereupon had that on the sixteenth day of said June, said corporation was adjudged and declared a bankrupt by a decree of said district court; and that thereafter and on the 8th day of September last, your complainant was duly appointed the assignee in bankruptcy of said corporation, whereupon your petitioner accepted said trust and duly qualified therefor according to the requirements of said act of Congress; and that on the eighth day of said September, by a deed of assignment and conveyance, executed in the form and manner provided by said *said* act of Congress, all the property, real and personal, of the said corporation, including the real estate aforesaid, became and was conveyed to and vested in your complainant as such assignee in bankruptcy; and that thereupon your complainant entered upon the said real estate and now holds possession thereof as the assignee in bankruptcy of said corporation.

And complainant further says that a certain corporation, located and having its place of business in the county of New York, in the southern district of New York, entitled "The New York Guaranty and Indemnity Company," created and existing by virtue of a law of the State of New York, passed on the 13th day of April, in the year eighteen hundred and sixty-four, entitled "An act to incorporate the New York Guaranty and Indemnity Company," claims to have some interest in or lien upon said real estate, by virtue of a certain alleged mortgage thereof, purporting to have been executed on the 29th day of April, 1867, on behalf of said bankrupt corporation, and under its corporate seal, by Abraham M. Cozzens, then its president, and George W. Austin, then its secretary, a copy of which and of the certificates of the acknowledgement and registration thereof is hereto annexed, marked A;
7 that the claim of interest thus made by said New York Guaranty and Indemnity Company in and upon said real estate is adverse to the claim and interest upon and in the same of your complainant as such trustee in bankruptcy as aforesaid; that said "The York Guaranty and Indemnity Company," on or about the 10th day of October current, commenced an action against your complainant in the supreme court of the State of New York, by service upon your complainant of summons and complaint, wherein it is alleged among other things that said mortgage is a valid and subsisting mortgage and lien upon said real estate as security for a loan of one hundred thousand dollars made by said The New York Guaranty and Indemnity Company to said bankrupt corporation, and wherein the said New York Guaranty and Indemnity Company demand against your complainant and the other defendants named therein, among other relief, that the said mortgage be established and adjudged a valid and prior lien upon said real estate, and that the said bankrupt corporation be adjudged to be indebted to said New York Guaranty and Indemnity Company in said sum of one hundred thousand dollars and interest, and that your complainant and said other defendants be barred and foreclosed of all their right, claim, lien and equity of redemption therein, and that said premises be sold under the order of said supreme court for the purpose of foreclosing said mortgage and paying said alleged debt.

That the said New York Guaranty and Indemnity Company has also served upon this complainant a notice that upon the said complaint and

other papers, it will move the said supreme court for the appointment of a receiver of said premises pending said action.

That this complainant has not appeared in said action nor submitted himself or the subject matter thereof to the jurisdiction of said supreme court.

And complainant further says, upon his information and belief, that said alleged mortgage is not and never was a valid
8 and subsisting mortgage or lien upon said real estate; that in and by the laws of the State of New York, under which said bankrupt corporation was organized, it was prohibited from making any mortgage of or giving any lien upon said real estate, provided, however, that by and under said laws it was authorized to mortgage its said real estate to secure the payment of debts contracted by it in the business for which it was incorporated, the written assent thereto of the stockholders owning at least two-thirds of its capital stock having been first filed in the office of the clerk of the county where such real estate is situated; that said mortgage was not made and executed in the form and manner nor for the purpose authorized by said laws, nor was the same made by or with the consent of the said bankrupt corporation; and that the said Abraham M. Cozzens and George W. Austin had in fact no authority to make and execute the same in the name or under the seal of the said bankrupt corporation, nor was the said mortgage made to secure the payment of any debt contracted by said bankrupt corporation in the business for which it was incorporated, and that the written assent of its stockholders owning at least two-thirds of its capital stock was not given to the making of said mortgage, nor filed in the office of the clerk of said county of Queens before the execution thereof.

And that if it shall be made to appear that said mortgage was given to secure any debt due or owing from the said bankrupt corporation to said New York Guaranty and Indemnity Company, that the same, if any, is a debt provable against the estate of the said bankrupt in said proceedings in bankruptcy.

And complainant further says, upon information and belief, that said mortgage was in fact given to said New York Guaranty and Indemnity
Company to secure a certain bond of the said Abraham M. Coz-
9 zens, referred to in said mortgage, a copy whereof is hereto annexed marked B; and that said New York Guaranty and Indemnity Company has never loaned or advanced to the said bankrupt corporation any money upon the security of said mortgage, nor has any money advanced by the said New York Guaranty and Indemnity Company to said Cozzens upon the security thereof ever come to the hands and possession of said bankrupt, or of your complainant as assignee.

And complainant further says that said New York Guaranty and Indemnity Company was not, at the time of the transactions aforesaid, authorized by law to receive or retain interest on any loan of money made by it at a larger rate than seven per centum per annum, and upon information and belief he says that upon the loan to said Cozzens for which said bond and mortgage was given as aforesaid, it did retain and receive interest at a much higher rate than seven per centum, to wit, at the rate of sixteen per centum per annum, and that the sum due, if any under said bond, is much less than said sum of one hundred thousand dollars, and that said bond and mortgage are invalid, usurious, and void.

And complainant further says, upon information and belief, that the said bankrupt corporation after the execution and registering of said alleged mortgage contracted debts to a large amount, exceeding

fifty thousand dollars, in the business for which it was organized, which debts are provable against its estate in said bankruptcy proceedings, and some of which have been already proved, and that the creditors to whom said debts were contracted gave credit to said bankrupt corporation upon the faith and credit of said real estate, upon which there was not at the time said debts were contracted any mortgage executed in the manner and for the purpose authorized by the said laws under which the said bankrupt was incorporated.

And said complainant says and charges that the claims, acts
10 and doings of the said New York Guaranty and Indemnity Company as aforesaid tend to delay, hinder and embarrass the administration of said bankrupt estate in the hands of your complainant, the collection of its assets, the ascertainment of its debts and the final distribution of its assets among its creditors, and are contrary to equity and good conscience.

That there is a large amount of machinery and other valuable personal property, part of the assets of said bankrupt corporation, in and upon the said premises, which will be greatly damaged by an immediate and forced separation thereof from the real estate, and the whole of said property can be sold to much greater advantage by keeping said property together; that the appointment of a receiver of said real estate might compel an immediate removal of said personal property from the real estate before a sale could be effected, and thereby your complainant as such assignee would be greatly damaged, and the assets of said estate greatly injured and reduced.

And said complainant further says that said real estate is of a perishable nature, and liable to deteriorate in value and decay, and that the care and custody thereof, and the insurance thereof against fire are very expensive, and that the same yields no revenue, whereby the assets of said estate are and will be greatly diminished and reduced, and that it is for the interest of all the parties having and claiming to have any interest therein that the same should be sold under the decree of this court, and that the same cannot be sold subject to the rights of said New York Guaranty and Indemnity Company under said mortgage for a fair price on account of the doubt existing as to the validity thereof.

And complainant further says that he is willing and hereby offers
11 to have any sum that shall be found justly due and owing from the said bankrupt corporation to said New York Guaranty and Indemnity Company for which the last named corporation hold any valid lien or mortgage upon said real estate, adjudged to be paid out of the proceeds of said real estate, if sufficient therefor.

Wherefore and forasmuch as your complainant is remediless according to the strict course of the common law, and can only have relief in a court of equity, your complainant prays that the said The New York Guaranty and Indemnity Company be required to answer all and singular the premises, and that said alleged mortgage be adjudged and declared wholly invalid and void by reason of the premises, or that the amount due thereon and secured thereby, if any, be determined by the decree of this court, and that said real estate be forthwith sold and conveyed under the order and decree of this court, under the direction of your complainant, and the proceeds thereof disposed of as the rights and interest of the several parties claiming an interest therein shall require, and that the amount, if any, found justly due to the said New York Guaranty and Indemnity Company and a valid lien upon said real estate be paid to said corporation out of said proceeds.

And also that a writ of injunction be issued out of and under the

seal of this court, directed to the said The New York Guaranty and Indemnity Company, their officers, agents, and attorneys, perpetually enjoining and restraining them from further prosecuting or taking any further proceedings in the said action commenced as aforesaid in the said supreme court of the State of New York, or any other action or proceeding for the enforcement of said mortgage, and also that a temporary writ of injunction be issued restraining the said parties as aforesaid until the further order of this honorable court thereupon, and
12 that the complainant may have such other and further relief as to the court shall seem meet in the premises.

E. A. CARLEY,
Solicitor for Compl't.

UNITED STATES,
Eastern District of New York, to wit:

Charles Jones, being duly sworn, deposes and says that he is the complainant above name; dthat he has read the foregoing bill of complaint and knows the contents thereof; that the matters therein stated are true of his own personal knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes them to be true.

CHARLES JONES.

Sworn to before me, September 28th, 1869.

SAMUEL T. JONES,
U. S. Com'r.

A.

[U. S. int. rev. stamp, $100, cancelled.]

This indenture, made the twenty-ninth day of April, in the year one thousand eight hundred and sixty-seven, between the New York Kerosene Oil Company, a manufacturing corporation created under the laws of the State of New York, of the first part, and the New York Guaranty and Indemnity Company of the city of New York, of the second part.

Whereas at a regular meeting of the board of trustees of the said The New York Kerosene Oil Company, held on the ninth day of March, one thousand eight hundred and sixty-seven, it was resolved that Abraham M. Cozzens, president of said company, be authorized to borrow
13 a sum not to exceed one hundred thousand dollars, and to secure the same to execute a mortgage upon the factory and premises of the said company at Newtown, Queens County, Long Island.

And whereas the said Abraham M. Cozzens has made and delivered to the said parties of the second part his certain bond or obligation, bearing even date with these presents, in the penal sum of one hundred thousand dollars, lawful money of the United States of America, which said bond declares that the same is given to secure advances to be made by the said parties of the second part to the said Abraham M. Cozzens, in all not to exceed the sum of one hundred thousand dollars, upon certain conditions therein contained, as by reference to said bond will more fully appear, and the consent of stockholders of said party of the first part to the making of this mortgage having been first duly given and filed pursuant to law, and recorded herewith: Now this indenture witnesseth that the said parties of the first part for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon according to the true intent and meaning thereof, and also for and in con-
c

sideration of the sum of one dollar to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey, and confirm unto the said parties of the second part, and to their successors and assigns forever, all those certain pieces or parcels of land lying together, situate in the town of Newtown, county of Queens, State of New York, which taken together are bounded and described as follows, that is to say: Beginning at a stake at the intersection of the division line between land lately belonging to Helenah Kowenhoven, and land lately belonging to the heirs of Agnes Pine, deceased,
14 with the centre line of a street one hundred feet wide, laid out or to be laid out, which centre line of such street measured on such division line is distant six hundred and sixty-seven feet easterly from the edge of the meadow on Newtown Creek, as such meadow formerly was, and running thence southeastwardly along the centre line of such street, laid out or to be laid out, four hundred and twenty-one feet and two inches, more or less, to the northerly line of land now or late of Orsamus Bushnell, formerly of Paul Rapelye, thence southwesterly along such last mentioned land six hundred and five feet three inches, to the edge of the meadows as formerly existing, thence continuing on the same course to the Newtown Creek three hundred and twenty-seven feet and nine inches more or less to the division line between the land late of Helenah Kowenhoven and land late of the heirs of Agnes Price, deceased, and thence northeastwardly along such division line eight hundred and sixty feet, more or less to the place of beginning, together with the right to the land under water in Newtown Creek, in front of the above described premises, and all the water right and privileges to the said premises belonging or in anywise appertaining; and also all that triangular piece of land situated at Dutch Kills, in Newtown, Queens County, and State of New York, and bounded as follows: Beginning at a point on the easterly side of Newtown Creek adjoining land heretofore conveyed by Neziah Bliss and Samuel Sneden and their respective wives to Erastus W. Smith, and late of the North American Kerosene Gas Light Company, running thence northeasterly along the said land, late of the said company, to a point where the same is intersected by the centre line of First street, as said street is laid down on a certain map filed in the clerk's office of Queens County, entitled "Map of the farm of Francis and Eve Duryea, situated on the Newtown and Dutch Kills Creeks in Newtown, Queens County, as sur-
15 veyed, and a portion thereof laid out into lots for Neziah Bliss and Samuel Sneden by Van Alst and Meserole, city surveyors, May, 1856;" thence westerly along the centre line of said street to the easterly side of Newtown Creek, and thence southerly along Newtown Creek to the place of beginning, together with the right to land under the waters of Newtown Creek in front of said last described premises, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the same and every part and parcel thereof, with the appurtenances, to have and to hold the above granted and described premises, with the appurtenances, unto

the said parties of the second part, their successors and assigns, to their own proper use, benefit, and behoof forever.

Provided always, and these presents are upon the express condition, that if the said parties of the first part, their successors and assigns, shall well and truly pay unto the said parties of the second part, their successors or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon at the time and in the manner mentioned in the said condition according to the true intent and meaning thereof, that then these presents and the estate hereby granted shall cease, determine, and be void. And the said Abraham M. Cozzens, for himself, his heirs, executors, and administrators, doth covenant and agree to pay unto the said party of the second part, their successors or assigns, the said sum of money and interest as mentioned above and expressed in the condition of the said bond.

And if default shall be made in the payment of the said sum of
16 money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the said parties of the second part, their successors and assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same and all benefit and equity of redemption of the said parties of the first part, their successors or assigns therein, at public auction, according to the act in such case made and provided. And as the attorney of the said parties of the first part for that purpose, by these presents duly authorized, constituted, and appointed to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase money (if any there shall be) unto the said parties of the first part, their successors or assigns, which sales so to be made shall forever be a perpetual bar, both in law and in equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from, or under them or either of them.

In witness whereof the parties of the first part to these presents have hereunto set their corporate seal the day and year first above written.

Sealed and delivered in the presence of—

[CORPORATE SEAL OF N. Y. K. OIL CO.]

GEORGE W. AUSTIN,
Secretary.
ABRAHAM M. COZZENS,
Pres't N. Y. K. Oil Co.

17 STATE OF NEW YORK,
City and County of New York, ss:

On this seventh day of May, in the year eighteen hundred and sixty-seven, before me personally came Abraham M. Cozzens, president, and George W. Austin, secretary of the New York Oil Company, the corporation described in and which executed the foregoing instrument, and the said Cozzens and the said Austin being to me severally personally known and being by me severally duly sworn, did depose and say, each for himself, that the seal affixed to the foregoing instrument and opposite to which their names are respectively set, is the corporate seal of the said corporation, and that the said seal was thereto affixed by the authority of the said corporation. And the said Abraham M. Cozzens

did further depose and say that he resides in the city of New York; that he is the president of the said the New York Kerosene Oil Company, the corporation described in and which executed the foregoing instrument, and that he subscribed his name thereto opposite to said seal by the authority of said corporation. And the said George W. Austin did further depose and say that he is the secretary of the said the New York Kerosene Oil Company, the corporation described in and which executed the foregoing instrument; that he resides at Fort Hamilton, county of Kings and State of New York, and that he subscribed his name to said instrument, opposite to said seal, by the authority of said corporation.

S. L. OGDEN,
Notary Public, New York County.

STATE OF NEW YORK,
City and County of New York, ss:

I, William C. Conner, clerk of the city and county of New York,
18 and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that S. L. Ogden, whose name is subscribed to the certificate of the proof or acknowledgement of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgement, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to said certificate of proof or acknowledgement is genuine.

I further certify that said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 11th day of May, 1867.

[SEAL.] WM. C. CONNER, *Clerk.*
[Stamp, 5 cts.]

Recorded in Queens' County clerk's office, in liber 159 of mortgages, page 400, &c., May 11th, 1867, at 4 o'clock p. m.

Examined by—

JONAH T. HEGEMAN, *Clerk.*

B.

Know all men by these presents that I, Abraham M. Cozzens, of the city of New York, am held and firmly bound unto The New York Guaranty and Indemnity Company in the sum of one hundred thousand dollars, lawful money of the United States of America, to be paid to the said New York Guaranty and Indemnity Company, their successors or assigns, for which payment, well and truly to be made, I bind
19 myself, my heirs, executors, and administrators firmly by these presents, sealed with my seal, dated the twenty-ninth day of April, one thousand eight hundred and sixty-seven.

This bond is given to cover advances of money now or hereafter to be made by the said The New York Guaranty and Indemnity Company to the said Abraham M. Cozzens for the sum of one hundred thousand dollars, or any less amount, upon condition that whenever any sum shall be advanced on this bond by the said The New York Guaranty and Indemnity Company to the said Abraham M. Cozzens, the amount of such advance, and the date of the same, shall be endorsed on this instrument,

and signed by the said Abraham M. Cozzens; and when the same or any part thereof shall be paid, such payment shall be endorsed on or under such statement of advance, and the amount which shall at any time appear by said indorsements of advances and payments to be then due shall be taken and considered as the true amount due on said bond, and for which the premises which have this day been conveyed to the said The New York Guaranty and Indemnity Company by the New York Kerosene Oil Company by indenture of mortgage bearing even date herewith, shall be held liable, and for no greater sum.

A. M. COZZENS. [L. S.]

In presence of—
SAMUEL E. LYON.

NEW YORK, *May* 11, 1867.

The New York Guaranty and Indemnity Company have this day advanced me fifty thousand dollars, on the note of The New York Kerosene Oil Co., which amount is secured by this bond.
$50,000.

A. M. COZZENS.

NEW YORK, *May* 18, 1867.

The New York Guaranty and Indemnity Co. have this day advanced me twenty-five thousand dollars on the note of the N. Y. Kerosene Oil Co., which amount is secured by this bond.
$25,000.

A. M. COZZENS.

20 NEW YORK, *June* 22, 1867.

The N. Y. Guaranty and Indemnity Company have this day advanced me twenty-five thousand dollars on oil, which amount is secured by this bond.

A. M. COZZENS.

(Endorsed:) District court of the United States, eastern district of New York. In bankruptcy. Charles Jones, assignee in bankruptcy, vs. The New York Guaranty and Indemnity Company. Bill in equity. E. A. Carley, sol'r for compl't. Filed Sept. 28th, 1869.

UNITED STATES OF AMERICA:

District court of the United States for the eastern district of New York.

To the honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The answer of the New York Guaranty and Indemnity Company of the city of New York, a body politic and corporate, to the bill of complaint of Charles Jones, assignee in bankruptcy of the New York Kerosene Oil Company, complainant.

This defendant, now and at all times hereafter saving and reserving to itself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says as follows:

First. This defendant admits that on 30th day of October, 1868,

21 the said complainant filed in this court a petition in the matter of the New York Kerosene Oil Company, a bankrupt corporation, as stated and averred in said bill of complaint; and that thereupon such proceedings were had that this defendant was ordered to answer the said petition; and thereupon, and upon the petition of this defendant asking a review of said order, such proceedings were had in the circuit court of the United States for said district, that it was among other things ordered, that said complainant have leave to amend his said petition so as to make it a bill in equity, and to file the same as a bill in equity, and that thereupon a copy of the same be served on the defendant, and that thereupon this defendant answer the same; and this defendant avers that the said last mentioned order, so made by the judge of the circuit court of the United States, remains on record in said court, and defendant refers to the same, and avers that the said judge of the circuit court had no authority or jurisdiction to make such order, so far as the same directs the filing of said bill of complaint in this court, or directs defendant to answer the said bill of complaint in this court, but that said order should have directed the filing of said bill in the circuit court of the United States aforesaid; and this defendant avers and claims that this honorable court has not by law any cognizance of or jurisdiction over causes in equity, and that all the proceedings of the complainant in the filing of said bill of complaint are void, and that this defendant cannot lawfully be proceeded against in this court by bill of complaint; and therefore this defendant humbly prays that the said bill be dismissed by this honorable court for want of jurisdiction.

Second. This defendant, further answering the said bill of complaint, admits that the New York Kerosene Oil Company named in said bill of complaint was the owner, at the time mentioned in said
22 bill of complaint, of the real estate therein described; this defendant denies any knowledge or information sufficient to form a belief, and is ignorant in respect to the alleged petition in bankruptcy of said last named company, or the appointment of said complainant as assignee in bankruptcy, or whether the assignment and conveyance alleged in said bill of complaint to have been made to him by said company of said real estate was ever made; but this defendant admits that said complainant has entered into and upon said real estate and claims to hold the same as assignee in bankruptcy of said company.

And this defendant admits that it claims to have an interest in and lien upon the said real estate by virtue of the mortgage referred to in said bill of complaint, and that it did on or about October 10, 1868, commence an action in the supreme court of the State of New York as plaintiff against said complainant and others, defendants, for the foreclosure of said mortgage, and for the sale of said mortgaged premises, as averred in said bill of complaint; and that this defendant did give notice of a motion for the appointment of a receiver of said mortgaged premises, as averred in said bill of complaint.

And this defendant, further answering, denies that said alleged mortgage to this defendant was not and is not a valid and subsisting mortgage or lien upon said real estate, and denies that said New York Kerosene Oil Company was in and by any law of the State of New York prohibited from making said mortgage, or that said mortgage was not made and executed in the form and manner and for the purposes authorized by law or with the consent of said New York Kerosene Oil Company, and denies that Abraham M. Cozzens and George W. Austin, in said bill of complaint named, had in fact no authority to make and execute said mortgage in the name or under the seal of said company,

and denies that said mortgage was not made to secure the pay-
23 ment of any debt contracted by said company in the business for which it was incorporated, or that the written assent of its stockholders, owning at least two-thirds of its capital stock, was not given or filed, as averred in said bill of complaint, before the execution thereof; and on the contrary thereof this defendant avers that the said mortgage was duly made and executed by said New York Kerosene Oil Company in pursuance of law and in conformity with the provisions of law of the State of New York relating to manufacturing companies, to secure the payment of a debt contracted by said company in the business for which it was incorporated, the consent of stockholders owning more than two-thirds of the capital stock of said company having been first duly given and filed before the execution thereof; and this defendant denies each and every allegation of said bill of complaint which in any manner impeaches or attacks the said mortgage, or states or avers as matter of fact anything which, if true, would impair or affect the validity of said mortgage.

And this defendant, further answering, denies that said mortgage was in fact given to this defendant to secure the bond of the said Abraham M. Cozzens in said bill of complaint referred to otherwise than so far as the said bond was evidence of a debt of said New York Kerosene Oil Company, of which the said Cozzens was the president, and in pursuance of its authority and direction to said Cozzens, and denies the allegation of said bill of complaint that this defendant has never loaned or advanced to said New York Kerosene Oil Company any money upon the security of said mortgage, and the further allegation that no money advanced by this defendant to said Cozzens ever came to the hands or possession of said company.

And this defendant, further answering, denies that it made any loan to said Cozzens, or that upon any loan to said Cozzens it retained
24 or received interest at a higher rate than seven per centum per annum, or that said bond or said mortgage were received as security upon or in connection with any loan at any usurious rate of interest, or that said bond and mortgage are invalid, usurious and void.

And the said defendant, further answering in respect to the allegations of said bill of complaint charging that said mortgage was made in connection with a usurious loan of money, or as security for a usurious loan of money, avers that all the moneys loaned or advanced by said defendant, secured by said mortgage, were so advanced to the New York Kerosene Oil Company, a corporation created and existing under the laws of the State of New York; and that by the laws of the said State of New York the said corporation was prohibited from interposing the defence of usury in any action, or against any claim or demand. That said complainant herein has paid no consideration for the said mortgaged premises, and that the same is in his possession only as assignee in bankruptcy of said corporation; and that said charge and claim in said bill of complaint contained, in respect to the usurious character of said loan or advance, cannot legally be set up or made available by said complainant.

The said defendant further answering, denies any knowledge or information as to the further allegation of said bill of complaint respecting the debts alleged to have been contracted by said New York Kerosene Oil Company after the execution and recording of said mortgage, or as to any credit given to said corporation on the faith of said real estate, and this defendant denies that any claim, act or thing done by this defendant tends to hinder, delay, or embarrass the administration

of said alleged bankrupt estate in the hands of said complainant or the collection of its assets, the ascertainment of its debts, or the final
25 distribution of its assets among its creditors, or that any of said claims, acts or doings are contrary to equity or good conscience.

The said defendant further answering the said bill of complaint, denies that there is any personal property on said mortgaged premises which will be damaged by a sale separate from said real estate, or that the whole of the property can be sold to greater advantage by keeping it together, or that the appointment of a receiver thereof would cause any damage to said complainant.

And in respect to the other matters alleged in said bill of complaint, touching the situation and condition of said mortgaged premises, this defendant claims and avers that no sale should be made of said mortgaged premises, or any part thereof, except subject to the aforesaid mortgage to this defendant or for the purpose of paying the amount due thereon, principal and interest.

Third. And this defendant further answering as a separate defense herein, states and shows to this honorable court that the said New York Kerosene Oil Company was incorporated under the act of the legislature of the State of New York, to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes, passed February 17, 1848, and the several acts in addition thereto and amendatory thereof, and was engaged in carrying on the business of manufacturing and refining kerosene oil on the said mortgaged premises.

That the real estate constituting said mortgaged premises had belonged to the North American Kerosene Gas Light Company, and was sold and conveyed by a receiver of the property of said company appointed by the supreme court of the State of New York, and upon such sale and conveyance the title to the same became vested in certain parties who formed and organized a new corporation called the New York Kerosene Oil Company, and the said real estate, at a nom-
26 inal value, was represented by the capital stock of said company and constituted its principal property for the purposes of its business.

That at or about the time of the formation of the said New York Kerosene Oil Company, and thereafter, the said Abraham M. Cozzens was, by the vote and agreement of all the corporators and stockholders and by their request, consent and acquiescence, authorized and empowered to carry on the work and business of said company, to employ persons in and about the business, to make purchases and audit bills, and generally to manage and conduct all its affairs, financial and otherwise. That the said Abraham M. Cozzens, shortly after the organization of said company, became the owner of a large amount of the capital stock thereof, and continued to acquire the same until before the time of making of the mortgage hereinbefore set forth, he became and was the owner of nearly all of said stock; and that in the year 1864 he became, and since that time and until his death in 1868, was the president of said company; and that from the first organization of said company down to the time of the making of said mortgage the said Abraham M. Cozzens, or his firm of Cozzens & Co., composed of himself and his son Thomas H. Cozzens, with the full knowledge, sanction, and authority of all the trustees and stockholders of said company managed and conducted the financial affairs of said company, and made purchases and sales for and on account of said company, and borrowed money and pledged the oil and other property of said company as security therefor, and made all the negotiations and arrangements necessary to carry

on the business of said company according to his own discretion, and by the use of the means and credit of said company, or of his own means and credit, or that of his said firm of Cozzens & Co.; that the moneys of said company were received by said Cozzens, or Cozzens & Co., and the disbursements, expenses and debts of said company
27 made, paid or provided for by said Cozzens & Co.; and that the financial affairs of said company, its accounts and dealings, were kept by said Cozzens & Co. in their own books, and that while the formal and apparent organization of said company was kept up by the annual election of trustees and officers, annual publication of reports as required by law, the business of said company was in fact transacted by or under the direction of said Abraham M. Cozzens, and according to his direction; that the nominal trustees of said company were, at the time of the transactions next hereinafter stated, the said Abraham M. Cozzens, James E. Kelley, brother-in-law of said Cozzens, having five shares of stock standing in his name; Francis H. Cozzens, his son, having fifty shares of stock standing in his name; George W. Austin, having two shares of stock standing in his name; and Thomas H. Cozzens, also son of said Abraham M. Cozzens, having no stock standing in his name; and Charles L. Wheeler having five shares standing in his name.

That heretofore, at the city of New York, before the making of the aforesaid mortgage, while the said Abraham M. Cozzens was conducting the business of the said New York Kerosene Oil Company, as aforesaid, and being then and there the president of said company and the owner of over two-thirds in amount of the capital stock of said company, and being thereto fully authorized as aforesaid, he made application in the regular course of business to this defendant to make advances to said New York Kerosene Oil Company on the security of the pledge of the property of the said company, to enable it to carry on the business for which it was incorporated. That said Cozzens first requested such an advance on the promissory note of said New York Kerosene Oil Company for $50,000, payable to the order of Cozzens &
28 Co., and endorsed by said Cozzens & Co., and said Cozzens then and there stated and represented to defendant that he was the owner of nearly all of the capital stock of said company; that he was carrying on its business and had the exclusive management of its affairs; that the said company was very largely indebted to him or his firm of Cozzens & Co. for money disbursed for said company, such indebtedness exceeding $100,000; that the said promissory note was for a part of such indebtedness; that in carrying on the operations of said company large sums of money were required by said company from time to time, and that if defendant would advance such sums as might be required by said company from time to time, said Company would secure the payment of any loan or advance which defendant might make by a mortgage of the real estate of said company, and also by pledge of the oil of said company, so that defendant should at all times be secured for the payment of any and all sums so loaned or advanced to said company or on his request for said company; that such statements and representations in respect to the ownership and control by said Cozzens of the capital stock of said company, and in respect to his authority to act for and to bind said company in the premises, were repeated by said Cozzens substantially as above set forth at various times, not only in connection with, and inducement of, the first advance made by defendant, but also afterwards in connection with the subsequent advances and renewals hereinafter mentioned, and by way of in-

ducing the same and such renewals, the said Cozzens stated and represented to defendant that he not only owned the capital stock of said New York Kerosene Oil Company, which stood in his name, but that he had purchased all the stock of said company, with the exception of a few shares standing in the name of other stockholders, and was, in fact, almost the sole owner, and was the sole manager of all the
29 property of said company; and defendant avers that the aforesaid statements and representations of said Abraham M. Cozzens were true, and aver the fact to be that he was the owner and holder of said capital stock as represented by him, and that he had purchased the stock of the other stockholders to the extent represented by him, and that he was authorized and empowered to act for the said company to the extent and in the manner represented by him.

That upon the faith of the said statements and representations of the said Cozzens, as president of said New York Kerosene Oil Company, made in behalf of said company, and upon the faith of the security of said mortgage to be made and executed by said company, defendant agreed to make and did make loans and advances of money on the promissory note of said New York Kerosene Oil Company for $50,000, endorsed by Cozzens & Co., on the like promissory note of said company, endorsed by Cozzens & Co., the further sum of $25,000, and the further sum of $25,000 on the pledge of warehouse receipts issued by said New York Kerosene Oil Company for 10,000 barrels of crude petroleum oil in bulk, contained in tanks in the store of the company at Hunter's Point, which said receipt stated and specified that said oil was held for account of and subject to the order of this defendant. That as security for the repayment of all said advances, and pursuant to the agreement and undertaking of said Cozzens on behalf of said New York Kerosene Oil Company, that the same should be secured by mortgage on all its real estate and works, the said New York Kerosene Oil Company made and executed the mortgage which is hereinbefore set forth. That the making of said mortgage was authorized by a vote or resolution, duly passed, of the board of trustees of said company, held on the 9th day of March, 1867. That the consent, in writing, of stockholders of said company, owning more than two third of its cap-
30 ital stock, was first given and filed as required by law. That the bond referred to in said mortgage was the bond of said Cozzens, made and executed in pursuance of said resolution; that said bond was prepared by the attorney and counsel of said Cozzens, or of said company, and produced to and delivered to defendant together with said mortgage, and was received by defendant as properly accompanying the same, but not in any manner as evidencing or securing a personal debt of said Cozzens; but the said mortgage was expressly agreed to be made, delivered, received, and accepted as securing the debt of said company contracted by said Cozzens on its behalf, and evidenced by the obligations of said company, on which the said advances were made, as stated and endorsed on said bond; and that in all its dealings and transactions with said Cozzens, in and in respect to the making of the said advances, defendant looked to the said New York Kerosene Oil Company as the primary debtor, and made all its advances upon the faith of the obligations of said company, and of the mortgage of its real estate; and that after the making, execution, and delivery of said mortgage, the first advance made by defendant of $50,000, and which said mortgage was given to secure, became due, and was renewed, and from time to time was thereafter renewed as a debt of said company; and further advances were made thereon as hereinbefore averred; and that

at all times since the making, execution, and delivery of said mortgage, the same has been held by defendant as security therefor, and that said mortgage constitutes the only security for said debt, the said New York Kerosene Oil Company having become insolvent, and the said Abraham M. Cozzens having died in the city of New York insolvent, and his firm of Cozzens & Co. being also insolvent. That defendant has duly demanded of said New York Kerosene Oil Company the oil described in said warehouse receipts, and has been informed by the persons in charge of the store of said company that said oil had been delivered to other parties, and that all operations have ceased at the works of said company; and that said defendant is now the owner and holder of said mortgage and mortgage debt, and that there is justly due and owing to defendant thereon the sum of $190,000, with interest, as follows:

31

On $50,000 thereof, from February 10th, 1868.
On $25,000 thereof, from December 18th, 1867.
On $25,000 thereof, from December 20th, 1867.

Wherefore this defendant claims and prays that by the decree of this court the validity and priority of the aforesaid mortgage may be established and adjudged; that the said mortgage may be decreed to be a first lien upon all the mortgaged premises hereinbefore described; that the said Kerosene Oil Company may be adjudged and decreed to be indebted to defendant, as hereinbefore alleged, in the aforesaid sum of one hundred thousand dollars with interest thereon, as hereinbefore claimed and set forth; that the priority of the lien of said mortgage and of said mortgage debt, and the right of the defendant to have the same charged upon said mortgaged premises and paid out of the proceeds of sale thereof, may be decreed; that the plaintiff, Charles Jones, as assignee in bankruptcy of said mortgage, may be decreed liable to pay said mortgage debt and interest out of the proceeds of sale of said mortgaged premises so far as the same will pay the said debt, or to hold said mortgaged premises subject to the lien of said mortgage, to the extent of the full amount thereof, that defendant recover the costs and expenses of this suit, and that defendant may have such other and further relief as shall be agreeable to equity and good conscience.

32

All of which matters and things this defendant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

BARNEY, BUTLER & PARSONS,
Attorneys for Def't.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James P. Wallace, being duly sworn, deposes and says that he is the president of the New York Guaranty and Indemnity Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it *to* be true.

JAMES P. WALLACE.

Sworn to before me this 3d day of February, 1870.

FRANK W. ANGEL,
Notary Public, N. Y. Co.

(Endorsed:) U. S. district court, eastern district of New York. Charles Jones, assignee, vs. The New York Guaranty and Indemnity Company. Copy. Answer. Barney, Butler & Parsons, def't's att'ys, 111 Broadway, N. Y.

SIR: Please take notice that the answer herein was this day filed with the clerk of the U. S. district court for the eastern district of New York.

N. Y., Feb'y 4, 1870.

Yours, &c.,

BARNEY, BUTLER & PARSONS,
Def't's Atty's.

To E. A. CARLEY, Esq.

Due service hereof admitted.
N. Y., Feb'y 4, 1870.

E. A. CARLEY,
Att'y for Charles Jones, Assignee.

Filed Feb'y 4, 1870.

33 United States district court, eastern district of New York.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY,
vs.
THE NEW YORK GUARANTY AND INDEMNITY COMPANY.

Before Judge C. L. Benedict, Jan'y 22, 1873.
Cause called. Both sides ready. Hearing ordered.
Appearances: PRICHARD & CHOATE, for plaintiff; BARNEY, BUTLER & PARSONS, for defendant.

Mr. Choate opens for plaintiff, and reads bill of complaint, and offers in evidence a certified copy of the incorporation of the New York Kerosene Oil Company, dated 24th day of May, '60, filed in the clerk's office of Queens County on the 30th day of May, 1860, marked Plaintiff's Ex. A; also from the record of the proceedings in bankruptcy of the New York Kerosene Oil Company, the petition and adjudication; petition dated 11th of June, 1868, and filed the 15th of June, 1868, marked Plaintiff's Ex. B; the adjudication dated the 16th day of June, 1868, marked Plaintiff's Ex. C; also the appointment of Charles Jones, the complainant, as assignee, on the 8th day of September, 1868, marked Plaintiff's Ex. D; also a certified copy of the assignment by E. S. Mills, register in bankruptcy, to Charles Jones of all the property of the New York Kerosene Oil Company, dated September 8th, 1868, marked Plaintiff's Ex. E.

34 *Evidence for complainant.*

CHARLES JONES sworn and examined as follows:

Direct examination:

Q. You are the complainant in this suit?
A. I am.
Q. And the assignee in bankruptcy of the New York Kerosene Oil Company?

A. Yes, sir.

Q. Did you appear in the suit brought by the New York Guaranty and Indemnity Co. upon the foreclosing of this mortgage?

A. I did not.

Q. Your name appeared as defendant in that suit?

A. I was one of the defendants.

Q. You never appeared in the action?

A. I did not appear.

Q. What does the property of this New York Kerosene Oil Company that has come into your hands consist of besides this real estate at Newtown Creek?

A. There was some personal property, consisting of coal and oil and barrel material.

Q. To what amount at the outside?

A. Well, my present recollection is that there was some ten thousand dollars' worth of personal property.

Q. And that, with this real estate, constituted the entire estate?

A. Yes, sir.

Q. And what are, in general terms, the amount of the debts proved against the estate?

(Objected to as immaterial; allowed.)

A. I have the proof of debts at my office—the claims proved. I think over a hundred thousand dollars of claims have been proved.

Q. Exclusive of any claim of the defendants in this case?

35 A. Yes, sir; I don't recollect any proof of the claims of the defendants. I suppose it would be proper for me to state that soon after the assignment I took possession.

Q. What is about the value of the real estate?

A. I am not able to state; I have heard various opinions; but I doubt whether it will bring in the market more than $120,000 from the information I have had.

Cross-examination:

Q. When did you take possession of the property of this New York Kerosene Oil Company?

A. Immediately after the assignment was made to me; within a few days.

Q. Were you present at the premises at Hunter's Point, where the business was carried on?

A. I have been there several times.

Q. At that time?

A. I went in person.

Q. Were there tanks for holding oil affixed to the real estate?

A. There were.

Q. Any oil in them?

A. There was oil in some of them, I think.

Q. Can you state how much oil there was in the tanks?

A. I can't now; I would be able to furnish the information if necessary.

Q. There was very little oil?

A. There was oil in some of the tanks.

Q. In how many?

A. I don't know; it made no particular impression on my mind at the time.

Q. Do you recollect selling any of the oil?

A. We sold all there was there.

Q. Can you state how much the oil produced?
A. No, sir, I cannot state how much.
Q. Was the quantity of oil considerable or inconsiderable?
36 A. Not very large in amount or value.
Q. Was there any oil there in bulk—not in tanks?
A. I think there was some in barrels.
Q. Do you recollect how much?
A. I do not now, it is some time ago.
Q. Did you make any inventory?
A. Yes, sir; I have a complete inventory.
Q. That you can produce?
A. Yes, sir.
Q. You have no personal knowledge in reference to the inception of this claim of the New York Guaranty and Indemnity Company?
A. No, sir; none.
Q. Or in reference to the making of the mortgage?
A. No, sir; no personal knowledge whatever on the subject.
Q. From whom did you derive the information embodied in the bill of complaint in this cause?
(Objected to as immaterial; disallowed; exception.)
Q. Do you know, Mr. Jones, who were the stockholders of the New York Kerosene Oil Company?
A. Only from information.
Q. Do you know, of your own knowledge, anything about the interest of any person, as stockholder or otherwise, in that company?
A. Not from any personal knowledge I had at the time.
Q. Have you any personal knowledge now?
A. I think I have had access to the books and to memorandum papers, which would give me the knowledge.
Q. Where are the books of the New York Kerosene Oil Company?
A. They are in the possession of my counsel in this case; some of them.
Q. They are in your possession?
37 A. Yes, sir.
Q. Will you state what books came into your possession?
A. I don't know that I examined them particularly so as to be able to state; they are at the office of Messrs. Prichard, Choate & Smith; I never went into any particular examination.
Q. Where did you first see the books of the company?
A. I saw them there at the office of Prichard, Choate & Smith, in Wall street.
Q. What connection had they with this company?
A. I employed them as counsel in the matter, and I believe they were the attorneys for the bankrupts.
Q. For the Kerosene Oil Company?
A. Yes, sir.
Q. Has any person claiming to be a stockholder of the New York Kerosene Oil Company, or a creditor of the New York Kerosene Oil Company, applied to you to bring this suit?
(Objected to; disallowed; exception.)

JORDAN M. FOWLER sworn for complainant.

Q. Where do you reside?
A. At Tarrytown.
Q. You were the secretary of the New York Kerosene Oil Company at the time it went into bankruptcy?

A. I was.
Q. Can you identify the book of minutes of that corporation?
A. I think I can, sir.
Q. (Showing witness a book.) Is that the book of minutes?
A. Yes, sir.
Q. You had in your possession as secretary this book, at the time you acted as secretary?
A. Yes, sir.
38 Q. Was there any other book of minutes of the proceedings of that corporation, or of its trustees?
A. None but that; no, sir.
Q. Who was the secretary before you?
(Objected to; disallowed.)
Q. Did you know George W. Austin?
A. I did.
Q. In whose employ was he, or where was his place of business? What was his business?
A. He was there as secretary of the New York Kerosene Oil Company.
Q. Was that immediately before you were there?
A. Yes, sir.
Q. Will you look at this book of records at page 27, and say whose handwriting that page is, and whose is the signature at the foot?
A. Mr. Austin's.
Q. And on page 28?
A. That is his also.
Q. And on pages 29, 30, 31, 32, 33, 34, and 35?
A. They are all Mr. Austin's.
Q. Then the next three pages are blank, are they?
A. Yes, sir.
Q. Then page 41?
A. That is where my record begins.
Q. On the 28th of March, 1868.
A. The date is there, sir.
I now propose to read from the minutes of the corporation, pages 32, 33, 34 and 35, the records of G. W. Austin, secretary.
(Objected to as being immaterial, inadmissible, and incompetent. Taken subject to objection.)
Mr. Choate read as follows:

Copy of the minutes of a meeting of the stockholders of the New York Kerosene Oil Company, held at 207 Pearl street, on the 4th of August, 1865, pursuant to notice, and postponed from 21st July, 1865.

39 NEW YORK, *August 4th*, 1865.

At the annual meeting of the stockholders of the New York Kerosene Oil Company, held this day pursuant to notice, at the office of the company, No. 207 Pearl street, for the purpose of electing trustees for the year from 21st July, 1865, the following stockholders were present, viz: A. M. Cozzens, F. H. Cozzens, Geo. W. Austin.
On motion of Mr. A. M. Cozzens, F. H. Cozzens was chosen chairman, and Geo. W. Austin was chosen secretary of the meeting.
Mr. F. H. Cozzens then announced to the stockholders present that the meeting had been called for the purpose of electing trustees for the year commencing 21st July, 1865.

On motion of A. M. Cozzens, Edward C. Cozzens and Samuel Bretzfeld were appointed inspectors of the election to be held.

The chairman then announced that the poll was open.

After balloting, the inspectors of election presented their certificate, a copy ot which follows:

COPY.

We, the undersigned inspectors of our election for trustees of the New York Kerosene Oil Company, held this day at the office of said company, 207 Pearl street, do hereby certify that 3,685 votes in all were cast, and that the following gentlemen, viz: Eli Kelly, A. M. Cozzens, F. H. Cozzens, Jas. E. Kelly, C. L. Wheeler and G. W. Austin, each received 3,685 votes.

The chairman then declared that Eli Kelly, A. M. Cozzens, F. H. Cozzens, Jas. E. Kelly, C. L. Wheeler and George W. Austin to have been duly elected for the year commencing 21st July, 1865.

G. W. AUSTIN,
Secretary Stockholders' Meeting.

40 NEW YORK, *March* 8, 1867.

At a meeting of the trustees of The New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: A. M. Cozzens, F. H. Cozzens, Geo. W. Austin.

Mr. A. M. Cozzens announced that the object of the meeting to be the filling of a vacancy in the board of trustees, Mr. Eli Kelly being desirous of retiring from the board.

Mr. F. H. Cozzens then presented the resignation of Mr. Eli Kelly, which was accepted.

G. W. Austin then nominated Mr. Thos. H. Cozzens to fill the vacancy.

On being balloted for, Mr. T. H. Cozzens was unanimously elected trustee in place of Mr. Eli Kelly.

The meeting then adjourned.

G. W. AUSTIN,
Secretary.

NEW YORK, *March 9th*, 1867.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: A. M. Cozzens, F. H. Cozzens, G. W. Austin, Thos. H. Cozzens.

On motion, it was resolved that the president be authorized to execute a mortgage for the sum of one hundred thousand dollars on their factory and works, situated at Newtown Creek, in Newtown, Queens County, and to affix the official seal of said corporation thereto.

The meeting then adjourned.

G. W. AUSTIN,
Secretary.

Q. Austin is dead?

A. Yes, sir.

Q. And A. M. Cozzens?

A. Yes, sir.

41 Q. (Handing the witness three books.) Look at the book shown

you labeled the "Stock Ledger," and state if that is one of the books of the New York Kerosene Oil Company.

A. Yes, sir; that is their stock ledger.

(Marked Plaintiff's Ex. F for identification.)

Q. Look at the book now shown you, being the book of transfer of stock, and state if that is a book of the New York Kerosene Oil Company.

A. Yes, sir.

(Marked Plaintiff's Ex. G for identification.)

Q. Look at the book of certificates, with 48 stumps of certificates cut out, and state if that is the stock-certificate book of the New York Kerosene Oil Company.

A. Yes, sir.

(Marked Plaintiff's Ex. H for identification.)

Cross-examination:

Q. When were you employed as secretary of this company?

A. I have forgotten; it was shortly after Austin's death.

Q. By whom employed?

A. Mr. A. M. Cozzens.

Q. Where did you first see this book of minutes?

A. I can't tell where.

Q. Shortly after you took possession as secretary?

A. Yes, sir; right away.

Q. Where was it then?

A. At the office in Pearl street, 134.

Q. What was that office?

A. Cozzens & Co., and the New York Kerosene Oil Company, both.

Q. What was the business of Cozzens & Co.?

A. Oils.

Q. A. M. Cozzens and his son?

A. Yes, sir.

Q. And the books of the Kerosene Oil Company were kept there?

42 A. Yes, sir.

Q. And you were in the employ of Cozzens & Co.?

A. Yes, sir.

Q. In what capacity?

A. Bookkeeper.

Q. General bookkeeper for Cozzens & Co.?

A. Yes, sir.

Q. Who paid you for your services as secretary of the New York Kerosene Oil Company?

A. I always drew the money and it was charged on the books; I don't know who paid it.

Q. On which books?

A. On Cozzens & Co.'s books.

Q. Were there any books of the New York Kerosene Oil Company other than that which you have identified here just now?

A. There was a journal and ledger, and minute book; I think that was all.

Q. There were other books than these which you have identified?

A. There was three books—the journal, the ledger, and minutes; and the smaller books, stock certificate, and transfer books.

Q. (By Mr. Choate.) No cash book?

A. Yes, sir, there was; I am not certain about that; I don't think there was a cash book of the New York Kerosene Oil Company.

Cross-examination resumed:

Q. Was there a cash book?

A. I think there was no cash book, but I cannot exactly remember.

Q. Did you keep the accounts, so far as there was any accounts, of the New York Kerosene Oil Company?

A. Yes, sir.

Q. Can't you remember whether they had a cash book?

43 A. I never used the cash book; I made journal entries, posted from the journal.

Q. Can you answer the question whether or not there was a cash-book of the New York Kerosene Oil Company?

A. I can't answer, because I have a slight impression that there was a cash-book that I never used.

Q. Where was the cash account generally kept in your book?

A. I guess the cash account was kept at the works, and they brought memorandums down, from which I made my entries in the books at the office, because there was minor details of the business we knew nothing about.

Q. What accounts were there on the books of Cozzens & Co.?

A. Only one account of the New York Kerosene Oil Company, debit and credit.

Q. There was such an account in the books of Cozzens & Co.?

A. Yes, sir.

Q. When you say that your salary was paid by Cozzens you mean that it was paid by Cozzens & Co., and the charge was made in the account in their books?

A. Yes, sir.

Q. And the same course pursued in reference to other payments on account of the company?

A. I don't know of any other except my own.

Q. What did this account on the books of Cozzens & Co. for the New York Kerosene Oil Company consist of?

A. When payments were made for the New York Kerosene Oil Company by Cozzens & Co.

Q. And money received from the works was credited in the books of Cozzens & Co. to the credit of the New York Kerosene Oil Company?

A. Yes, sir.

Q. Where are the books of Cozzens & Co.?

44 A. The assignee has them, I think; the assignee in bankruptcy of Cozzens & Co.

Q. Who is he?

A. Mr. Todd; 102 Broadway he used to be, but he has moved further up, I think, now.

(Mr. Choate states that he has the books of Cozzens & Co. in the court room.)

Q. Just identify the cash-book that you think was there, but which you didn't use.

A. (The witness identifies the cash-book.) This is it, but I don't think I ever made any entry in it; I know I never did.

Q. The entries that you made in their books, Mr. Fowler, were up to what time?

A. Up till the failure of the concern, and from the time that M. Austin died.

Q. And the entries appearing in those books were made by you at the time?

A. Yes, sir.

Q. Are you familiar with the handwriting of A. M. Cozzens?

A. Yes, sir.

Q. (Showing witness a paper introduced and marked Def'ts' Ex. 1.) Can you identify that as his signature?

A. Yes, sir; undoubtedly.

Q. After your appointment as secretary, when was the first meeting of trustees held?

A. I can't say.

Q. Do you recollect of any meeting of the trustees after your appointment as secretary?

A. Only one, I think; it is so long ago I have almost forgotten about this; I think only one that I can remember.

Q. Have you any present recollection of being present at any meeting of the trustees of the company after your appointment as secretary, and until its failure?

45 A. One meeting.

Q. When was that meeting?

A. I can't tell the date of it now.

Q. Nor how long after your appointment?

A. No, sir.

Q. Who managed the affairs of the New York Kerosene Oil Company?

A. A. M. Cozzens.

Q. Just state, generally, to what extent he had control of its affairs.

A. He had the buying of all their crude oil, and sold all their refined oil, and bought the materials necessary to make the change from the crude to the refined.

Q. Was there any other employee of the New York Kerosene Oil Company in the employ of Cozzens & Co. except yourself?

A. No, sir.

Q. Who made the purchases?

A. Mr. Cozzens.

Q. And who made the sales?

A. He did.

Q. Who brought to the office of Cozzens & Co., from the works, the particulars of the transactions there?

A. We had messengers going up and down all the time, and once a week there was a regular man employed to bring down the statements.

Q. Where was he?

A. He was at the works.

Q. Who employed him?

A. New York Kerosene Oil Company.

Q. What was his name?

A. Joseph F. Waller, I think; he kept the general accounts.

Q. Was he there before you was secretary?

A. Yes, sir.

Q. How was the labor paid at the factory?

46 A. This Mr. Waller used to make out the pay-lists, and bring them down to the office, and get the money, and take it up and pay the men.

Q. Were you the person who handled the money?

A. I used to draw the checks, and he got the money himself.

Q. Checks of Cozzens & Co.?
A. Yes, sir.
Q. Was there any bank account kept, anywhere, of the New York Kerosene Oil Company?
A. Not that I ever knew of.
Q. All receipts of moneys on account of the New York Kerosene Oil Company were deposited in the general bank account of Cozzens & Co.?
A. Yes, sir.
Q. And all payments made from Cozzens & Co.?
A. Yes, sir.
Q. Have you ever seen any bank-book or check-book of the New York Kerosene Oil Company?
A. Not that I remember.
Q. Never heard of their having any?
A. Never heard of it.
Q. Their moneys were mixed generally with the moneys of Cozzens & Co.?
A. All in one bank account; yes.
Q. Where was the bank account of Cozzens & Co. kept?
A. At the Metropolitan Bank.
Q. Did they keep any other account?
A. The firm kept only that one account.
Q. In reference to this real estate of the works, and the payments that were made, and disbursements for repairs and insurance, how was it as to their being made by Cozzens & Co., or disbursements on any other account; whether Cozzens & Co. didn't make those disbursements?
A. Yes, sir; from their account.
Q. Where is Thomas M. Cozzens?
A. He is here. This money was charged to the New York Kerosene Oil Company, you understand.
47 Q. Do you know any other stockholder in the New York Kerosene Oil Company, other than Mr. Cozzens and his son?
A. I knew all those that are mentioned here to-day.
Q. But they were mentioned as trustees?
A. That is so; I didn't think; I never saw much of the stockholders; I don't remember of seeing any of the stockholders at all.
Q. Which of the trustees did you see at that time, other than Mr. Cozzens and his son?
A. Mr. Austin and Wheeler.
Q. Who is Wheeler?
A. I don't know who he was; he used to buy oil, and was stationed down in the oil regions, for the New York Kerosene Oil Company.
Q. Do you know where he is now?
A. No, sir; I do not.
Q. Mr. Kelly was a brother-in law of Cozzens?
A. I believe he was.
Q. And Eli Kelly was the father-in-law of Cozzens?
A. I never saw that Kelly at all.
Q. But you understood that he was the father-in-law of Cozzens?
A. I always heard so.
Q. And the other Kelly—what is his name?
A. James E. Kelly was the brother-in-law.

Redirect examination:

Q. There was no separate salary affixed to your office as secretary of the New York Kerosene Oil Company?

A. No, sir.

Q. You were a bookkeeper, and in the employ of Cozzens & Co.?

A. Yes, sir.

Q. And all your time was given to his business?

A. All of it; yes, sir.

48 Q. And when you speak of your salary, it was the salary paid you by Cozzens & Co.?

A. Yes, sir; it was paid me by Cozzens & Co.

Q. You were also the bookkeeper for Cozzens & Co.?

A. Yes, sir.

Q. Did A. M. Cozzens keep a separate set of books individually?

A. I don't know as he ever did, only as his son took care of personal matters for him, but not that I ever had anything to do with.

Q. Then the New York Kerosene Oil Company and Cozzens & Co. were both in the same office?

A. Yes, sir.

Q. And the business of the New York Kerosene Oil Company was buying petroleum and selling it as they refined it?

A. Yes, sir.

Q. And Cozzens & Co. paid all the bills for the petroleum bought, and received moneys for the refined petroleum sold, and paid all the expenses?

A. Yes, sir.

Q. Now, these payments for crude petroleum on account of the New York Kerosene Oil Company went into the books of the New York Kerosene Oil Company kept by you, did they not?

A. It went into the books of the New York Kerosene Oil Company; yes, sir.

Q. And the receipts for refined petroleum sold were credited in the books of the New York Kerosene Oil Company?

A. Yes, sir.

Q. And the pay rolls paid went into the books, did they, of the New York Kerosene Oil Company?

A. Yes, sir.

Q. And all the expenses attending the real estate?

A. Everything in relation to their business went there.

49 Q. And Cozzens & Co kept an account with the New York Kerosene Oil Company, into which all these items went?

A. Yes, sir.

Q. Did the New York Kerosene Oil Company do any business, so far as you know, except through Cozzens & Co. representing them?

A. Not that I ever knew of.

Q. Did all the moneys received by Cozzens & Co. on account of the New York Kerosene Oil Company, so far as you know, go into the books of the New York Kerosene Oil Company?

A. Yes, sir.

(Taken, subject to objection.)

Q. Have you examined the books of the New York Kerosene Oil Company to see if the advances made by the New York Guaranty and Indemnity Company, in the year 1867, went into the books of the New York Kerosene Oil Company?

(Objected to as the books are present.)

Q. Please look at the cash book of the New York Kerosene Oil Company that you have identified, and state who kept that; look at the writing in the book and say who kept it, if you know.

A. I made no entries in that book; it is in George W. Austin's handwriting.

Q. Will you look at this journal identified by you as the book of the New York Kerosene Oil Company, and say in whose handwriting that is kept from page 140 to 220?

A. The bulk of it was made by Austin; there is some of my writing in between those pages.

Q. The entries on page 165 and at the foot of page 164, whose handwriting is that?

A. My handwriting.

Q. And page 166 and part of page 167, whose is that?

A. My handwriting.

50 Q. Otherwise it is in the handwriting of Mr. Austin?

A. Yes, sir.

Q. Your entries begin at page 220, do they not, under date of May 31, 1867?

A. Yes, sir.

Q. And from that time did you keep this book?

A. Yes, sir.

Q. The last four entries on page 122 are not in your handwriting?

A. No, sir; they are in Thomas Cozzens' handwriting.

Q. All the other entries are yours after page 220 except those you have specified?

A. Yes, sir; and the last entry is on page 254.

Q. The ledger is made up from this book, is it?

A. Yes, sir; posted from the journal into that book.

Q. No original entries in the ledger that are not in this other book?

A. No, sir.

Q. Have you examined this account during the year 1867, to ascertain whether any moneys received of the New York Guaranty and Indemnity Company are entered in this account?

(Taken subject to objection.)

A. Yes, sir.

Q. Are any such moneys entered in that book?

(Taken subject to objection.)

A. No, sir.

Q. Do you know the amounts claimed to have been advanced by the New York Guaranty and Indemnity Company—$50,000, $25,000, and the subsequent $25,000, making $100,000?

A. Yes, sir; I have looked for those sums and cannot find them.

Q Did you know of the fact at the time of the receipt by Mr.

51 Cozzens, from the New York Guaranty and Indemnity Company, of either of these sums—of receiving their check for either of these sums?

A. Not the original amounts I don't remember particularly about; I knew of the renewals.

Q. Were the checks received at the time of those renewals?

A. Not always they were not; but some checks were received when renewed.

Q. Were those receipts of money passed into these books of the New York Kerosene Oil Company?

(Taken subject to objection.)

A. No, sir.

Q. The firm of Cozzens & Co. did a large business, did they not, in oil?

A. Yes, sir.

Q. They did a large business outside of this business which they did for the New York Kerosene Oil Company?

(Taken subject to objection.)

A. Yes, sir.

Q. On their own account, in buying and selling oil?

A. Yes, sir.

Q. During several years, didn't they?

A. Yes, sir; all the time I was there.

Q. How long was you with Cozzens & Co.?

A. I think I went there in 1867, and was there till they closed; I can tell by looking at the books very readily; I have forgotten the date.

Q. Were you with Cozzens & Co. before you began to act as secretary of the corporation?

A. Yes, sir.

Q. See what the earliest entry is in your handwriting in this book—the journal of the New York Kerosene Oil Company.

52 A. In May, 1867, there is one entry where I assisted Mr. Austin during his sickness; I first began to act as secretary in May, 1867.

Q. How long before that had you been in the employ of Cozzens & Co.?

A. I don't think I could tell within—it is so long ago—unless I can refer to the other books.

Q. As near as you can; was it a matter of months or years?

A. Not over a year.

Q. How long before May, 1867, was it you went into the employ of Cozzens & Co.; was it about a year?

A. I can hardly remember, it is so long ago; I have nothing to refresh my memory by.

Q. The firm of Cozzens & Co. were requiring large sums of money in their own business, were they not?

(All this evidence taken subject to objection.)

A. Yes, sir.

Q. And raising large sums of money from time to time?

A. Yes, sir.

Q. Aside from the business of the New York Kerosene Oil Company?

A. Yes, sir.

Q. You attended to the packing of the papers of Cozzens & Co. and the New York Kerosene Oil Company, after the failure?

A. Yes, sir.

Q. What was done, if you know, with the old notes that were taken up—any old notes that were taken up, that were at the office—promissory notes?

A. They were destroyed with the checks.

Q. When?

A. At the time we removed the furniture to be sold.

Q. When was that?

53 A. I can't tell the date, but I have memorandums at home about all those things.

Q. By whose direction or by whose motion?

A. By the assignee of Cozzens & Co.

Q. Were there other old papers destroyed?

A. Yes, sir, all of them; they were in a drawer and I didn't know what to do with them.

Q. You kept the books?

A. Yes, sir,

Q. Do you know anything of the notes—the original notes that were given for these advances to the New York Guaranty and Indemnity Company?

A. No, sir.

Q. You can't identify any of the papers destroyed as being such papers?

A. No, sir.

Recross-examination by Mr. BUTLER:

You were with Cozzens & Co. as their general bookkeeper in February, and March, and April, 1867?

A. I don't remember exactly the date.

Q. You testified you went with them a year before.

A. I can't fix it without the books; it is five years ago, and I have forgotten those things.

(The witness refers to one of Cozzens & Co.'s books.)

Q. Can you answer after examining the books of Cozzens & Co., when you entered their employ?

A. About the middle of April, 1866.

Q. Then in February, March, and April, 1867, you were in their employ?

A. Yes, sir.

Q. You have stated that Cozzens & Co. were requiring large sums of money in their business. Did they not require large sums of money to carry on the business of the New York Kerosene Oil Company as well?

A. Yes, sir.

54 Q. That business of itself was a large one, was it not?

A. Yes, sir.

Q. Were you not at that time aware of the fact that Mr. Cozzens was the principal stockholder of that company in February, March, and April, 1867?

A. Yes, sir, I knew he was.

Q. And that he owned almost the whole of the stock?

A. I know he was the principal stockholder; I didn't know at that time how much he owned.

Q. Did you know at the time of his having arranged to purchase up and get control of all the stock of the company?

(Taken subject to objection.)

A. I don't think I knew much about that, because it was just about that time I began to know about the New York Kerosene Oil Company.

Q. Didn't you know, in 1867, that Cozzens was claiming to be owner of all the stock, or was making arrangements to get control of all the stock?

A. I don't think I knew that then.

Q. If Mr. Cozzens stated in February, 1867, to Mr. Wallace, the president of the New York Guaranty and Indemnity Company, that he was the owner of nearly all the stock—capital stock—of the company, and carried on its business, and had the exclusive management of its affairs, state whether or not that statement was true.

(Taken subject to objection.)

A. I suppose I should have considered it so, although I knew nothing of the state of affairs then.

Q. Because Cozzens said so, or because of your general knowledge of the business?

A. Of my general knowledge of the business transactions.

55 Q. If he stated that he was making large disbursements on ac-

count of the New York Kerosene Oil Company, was that statement true or false?

(Taken, subject to objection.)

A. That was true.

Q. If he stated that in carrying on the operations of the New York Kerosene Oil Company large sums of money were required from time to time for the purposes of the company, was that statement at that time true or false?

(Taken, subject to objection.)

A. It was true.

Q. Now, didn't you have personal knowledge at the time that Mr. Cozzens, or Cozzens & Co., were getting advances from the New York Guaranty and Indemnity Company for account of the New York Kerosene Oil Company?

A. I don't think I knew about the first advances because I hadn't access to the books at that time.

Q. How was it that you hadn't access to the books if you were the bookkeeper?

A. I wasn't bookkeeper when I first went there—not for some time after.

Q. When did you first know of the transactions between the New York Guaranty and Indemnity Company and A. M. Cozzens?

A. I should think it was about the first $50,000; I didn't know of it at the time, but when it was renewed I had knowledge of it.

Q. You said something about there being checks. What do you mean by that?

A. Mr. Cozzens would come and tell me to draw a check for the amount, and give me a check of the New York Guaranty and Indemnity Company; they exchanged checks when the notes were due.

Q. You say that upon the renewals, checks would be exchanged?

A. Yes, sir.

Q. You are quite sure of that?

A. I am quite sure of it; but not always; there was only one
56 or two transactions of that kind, and then afterward the interest would merely be paid and the notes run on. I never knew exactly because Cozzens did it at their office.

Q. The notes run on—what notes?

A. The loan, in whatever way it was. I knew nothing of the shape it was in.

Q. Did you ever make out, or fill out, or have anything to do with the preparation of any note or obligation to the New York Guaranty and Indemnity Company?

A. Nothing but checks.

Q. And these checks were checks to pay interest and commission?

A. Some of them, and sometimes the principal was paid.

Q. But if any check was given to pay the principal, simultaneously, on the same day, you received a check from the New York Guaranty and Indemnity Company, and for the renewal of the loan?

A. I am not certain whether that was done more than once.

Q. Are you certain it was ever done?

A. I think it was.

Q. Were not the checks you are speaking of checks for the further advances claimed by the New York Guaranty and Indemnity Company in addition to the original $50,000?

A. That I cannot say now.

Q Then you are not sure now but what those checks you refer to were checks for further advances?

A. I am under the impression that the checks were exchanged once at any rate; but I know the interest was paid regularly.

Q. Now, under whose general direction were these books kept of Cozzens and the New York Kerosene Oil Company?

A. I kept them both.

Q. Under whose general direction?

A. Under A. M. Cozzens'.

57 Q. Did you make entries in these books according to his directions?

A. Not exactly according to his directions, but I would make such entries as the transactions called for.

Q. Did you make any entries contrary to his directions?

A. No, sir.

Q. When you say the cash book or the ledger contains all the entries and all the moneys received by Cozzens on account of the New York Kerosene Oil Company, do you mean that no money was ever received by Cozzens, and for account of the New York Kerosene Oil Company, which is not in those books?

A. None that I know of.

Q. You only speak of it so far as your own knowledge extends?

A. That is all.

Q. Do you know whether or not the advances made by the New York Guaranty and Indemnity Company were made on the obligation of the New York Kerosene Oil Company?

A. I knew nothing about that.

Q. Did you ever see any of the obligations connected with these advances?

A. No, sir; not until after this suspension.

Q. Did you ever make notes of the New York Kerosene Oil Company yourself?

A. I think not; I don't think I ever drew a note for the New York Kerosene Oil Company.

Q. Who did then?

A. Mr. Cozzens must have done it outside, if it ever was done.

Q. Whether or not he did it, or to what extent he did it, you don't know?

A. No, sir.

Q. Now, in reference to the advances made by the New York Guaranty and Indemnity Company, do you say that nothing appears

58 in these books of the New York Kerosene Oil Company in reference to those advances?

A. Nothing whatever is on the books of the New York Kerosene Oil Company, to my knowledge, connected with it in any way.

Q. You know that advances were made by the New York Guaranty and Indemnity Company?

A. Yes, sir.

Q. And so far as you know the money was advanced, and while it went into the books of Cozzens & Co., was not the subject of any entry in the accounts of the New York Kerosene Oil Company?

A. Not in that shape; no, sir.

Q. What do you mean by that?

A. The money from the New York Guaranty and Indemnity Company went into Cozzens & Co.'s bank account, and then went to pay the bills of the New York Kerosene Company, by Cozzens & Co.'s checks.

Q. So far as the direct entries, as kept in the books of Cozzens & Co., are concerned, no other advances, nor anything connected with that, appears in those accounts?

A. Yes, sir; nothing appears in the books of the New York Kerosene Oil Company.

Q. There is a charge to the Kerosene Oil Company on page 340 of ledger D, of Cozzens & Co.'s books, in account with the New York Kerosene Oil Company, on page 340, May 27th, 1867: To cash, Barney, Butler & Parsons, of $262.49. Will you explain that entry?

A. I might if I looked at it.

Q. Well, look at it.

A. (Witness examines the entry.) No, sir, I cannot explain that charge. It is in Thomas Cozzens's handwriting.

Q. He was a member of the firm of Cozzens & Co.?

A. Yes, sir.

59 Q. Are you able to say whether or not that charge has any reference to the advance or mortgage claimed by the New York Guaranty and Indemnity Company?

A. I haven't the slightest idea of the transaction at all.

Q. I will get you to identify some more papers. These three papers; in whose handwriting are they? (First paper shown witness, marked for identification, Defendant's Ex., No. 2.)

A. The handwriting of this paper, the body of it, is in a handwriting with which I am not familiar. I identify the signature only as that of A. M. Cozzens.

Q. Was it by any one in the office?

A. I think not; I don't recognize it as the handwriting of any one in the office of Cozzens & Co.

Q. And the same as to papers marked for identification, Exs. Nos. 3, 4, and 5?

A. Yes, sir; I answer the same in reference to 3, 4, and 5.

Q. Did Mr. Cozzens continue to sell oil up to the time of the failure of the company—the oil of the company?

A. Yes, sir; up to the time of the suspension of Cozzens & Co.

Q To what extent had he sold the oil that was at Hunter's Point at the time of this failure?

A. I don't know what quantity he had left on hand.

Q. Don't you know the fact that pretty much all the oil had been sold?

A. No, sir; he never told me anything about the sales till the contracts came in, and I didn't know about the quantity at the works until the memorandum came from there at the end of the month.

Q. Then your knowledge of the sales made by Cozzens was derived absolutely from information you got from him or the contracts?

A. Yes, sir.

60 Q. And he might have sold large or small quantities without your knowledge?

A. Yes; he might have done so; he would sometimes forget to tell me of the sales till the next day.

A. You relied on him for your information?

A. Yes, sir; altogether; the sales were made on "'change."

Q. Do you know whether or not in June, 1867, the New York Kerosene Oil Company had any oil in bulk in the tanks, or in barrels?

A. I never kept track of that; I never knew the quantity at the works, either in bulk or in barrels.

(Question repeated.)

A. I never went to the works at all. I think they had some oil on hand, from the statement that was brought down from the works. I think there was a memorandum with some oil on it.

Q. Who had charge of the works at Hunter's Point?

A. John B. Cozzens superintended them.

Q. Was he actually there in charge?

A. Yes, sir; all the while.

Hearing suspended until January 23d, at 11 o'clock, 1873.

JANUARY 23D—11 a. m., 1873.

JORDAN M. FOWLER recalled. Cross-examination continued.

Q. I understand you to testify that all the sales of oil manufactured by the New York Kerosene Oil Company were made by Cozzens & Co.?

A. Yes, sir.

Q. In their own name?

A. Yes; except small quantities sold at the works.

Q. There was very inconsiderable sold at the works?

61 *Q.* Yes, sir; compared to what Abraham Cozzens sold on "'change" in New York.

Q. The sales made at the works, how were they made?

A. Parties would come there and buy two or three barrels, and pay cash for them, and take it away; sometimes a memorandum would be sent to the office, and he would send the bills.

Q. The proceeds of the sales made at the works—what became of them?

A. The money was paid in to Cozzens & Co., and went into their bank account.

Q. The sales made by Cozzens & Co. on "'Change," or otherwise in New York, were made in their own name?

A. Yes, sir.

Q. And the proceeds of those sales went into the books of Cozzens & Co.?

A. Yes, sir.

Q. When you took notes, were those notes entered in the bills receivable of Cozzens & Co. when Cozzens & Co. received notes in payment of the oil?

A. Yes, sir; that went into the bills receivable of Cozzens and Co.

Q. Was their account of bills receivable in the New York Kerosene Oil Company's books?

A. I think not, sir.

Q. Now, except the proceeds of the sale of oil manufactured by the New York Kerosene Oil Company, had that company any means or resources—cash means or resources—had the New York Kerosene Oil Company any cash resources?

A. I don't know exactly what you mean. They received some money from other sources than the sales of oil.

Q. What sources?

A. Lightering and laboring; they had a steam-tug and did a great deal of lightering and towing. With the steam-tug and lighters

62 they had they used to tow and lighter barges around the harbor.

Q. They derived some revenue from the use of their steam-tug?

A. Yes, sir.

Q. And what they derived in that way was received by Cozzens & Co.?

A. Yes, sir,

Q. Well, now, beyond that, they had no resources—no cash resources?

A. I think not.

Q. Not that you know of?

A. No, sir.

Q. And the cash required to carry on the business of the oil company was advanced by Cozzens & Co. from time to time?

A. Yes, sir.

Q. As occasions required?

A. Yes, sir.

Q. Did Cozzens & Co. charge a guaranty and commission?

A. Yes, sir.

Q. Then on all sales made by Cozzens & Co. of the oil manufactured by the New York Kerosene Oil Company they charged a commission, not only for making sales, but also for manufacturing?

A. Yes, sir.

Q. Well, as to business so done, when and how were the net proceeds of sale credited to the New York Kerosene Oil Company in the books of Cozzens & Co.?

A. At the end of each month, by making a general credit of the sum total of the month's sales.

Q. How were the cash disbursements ascertained and made matters of account as between Cozzens & Co. and the New York Kerosene Oil Company?

A. Whenever a bill was paid, it was paid by the New York Kerosene Oil Company, to be charged by them in Cozzens & Co.'s books at once.

Q. Monthly settlements, or monthly statements of the disbursements.

63 A. Yes, sir.

Q. And monthly statements of the proceeds of sales?

A. Yes, sir.

Q. And the net proceeds of sale, less the commission and guaranty, to be credited to the New York Kerosene Oil Company, at the end of the month, irrespective of whether the proceeds would be received or not?

A. Yes; the gross amount would be credited to them, and the commission charged to them.

Q. Cozzens & Co. took all the risk of collecting the bills receivable they held for the oil?

A. Yes, sir; 7½ was the usual commission and guaranty.

Q. Did they have a commission for buying and making purchases?

A. No, sir; only on sales.

Q. Now, on the cash disbursements and cash advances did they have a commission?

A. No commission; interest was charged.

Q. State whether or not the accounts were so kept that at the end of each month the state of the account could be ascertained.

A. It was.

Q. And, according to the mode of doing business, the credits to the New York Kerosene Oil Company consisted of the net proceeds of sales of oil, made by Cozzens & Co., or of any sales, or of anything derived from their lightering business?

A. Yes, sir; all credited to it.

Q. And the debits consisted of payments made by Cozzens & Co. on

account of the New York Kerosene Oil Company, and their commissions and interest?

A. Yes, sir; there was one or two shipments made by the New York Kerosene Oil Company on which there was a loss that was
64 charged to the New York Kerosene Oil Company; there was several shipments of oil made on account of the New York Kerosene Oil Company.

Q. Made by whom?

A. By the New York Kerosene Oil Company.

Q. To whom?

A. On the other side—shipments made to Europe; not direct sales, but shipments made on which there was a loss.

Q. Charged where?

A. On the books of the New York Kerosene Oil Company.

Q. You didn't enter it on the books of Cozzens & Co.?

A. Yes, sir; the same as disbursements, and charged at the end of the month.

Q. They paid the loss, and charged it to the New York Kerosene Oil Company?

A. Yes, sir; as one of their bills.

Q. In the books of the Kerosene Oil Company, as I understand, Cozzens & Co. were charged and debited with all these proceeds of sale?

A. Yes, sir.

Q. And credited with their advances?

A. Yes, sir.

Q. And that, on each of the accounts respectively, represented cash?

A. Yes, sir.

Q. What was the capital stock of the New York Kerosene Oil Company?

A. $500,000.00.

Q. Can you specify the principal items of property that they had, such as real estate?

A. The real estate buildings, the tug and lighters.

Q. And crude petroleum?

A. Well, there was the whole stock of crude oil, and their coal, and chemicals they used for refining.

Q. How do these items of property appear, if they do appear, on the books of the New York Kerosene Oil Company?

65 A. Well, there was one heading, called "Real estate account," under which everything of that kind appeared; and the chemicals appeared under another head, and the account of oils under another head.

Q. The items of actual cost?

A. Yes, sir.

Q. So far as you know the books were kept correct in showing actual cost of those several items?

A. Yes, sir.

Q. And the expenses applicable to their cost?

A. Yes, sir; charged to that account.

Q. Cozzens & Co. made all the purchases of oil?

A. Yes, sir.

Q. Did they make separate purchases of oil for the works for themselves? Did they make any purchases on their own account?

A. Not of crude petroleum.

Q. That is, they made no purchases of those articles that were re-

quired for the works, except for the works; they didn't require them in their own business?

A. No, sir.

Q. What purchases did they make in their own business?

A. Well, once in a while they bought quantities of oil for speculation.

Q. What sales did they make in their own business aside from the sales of the New York Kerosene Oil Company?

A. The sales of this oil they bought on speculation; that was all.

Q. Can you state what was the relative amount of the business done by Cozzens & Co. as compared with that done by the New York Kerosene Oil Company in 1867, apart from the kerosene oil works?

A. I can't state it now.

66 Q. All the transactions of Cozzens & Co., on their own account, as well as those of the New York Kerosene Oil Company, appear on their books, don't they?

A. Yes, sir.

Q. And the relative amount of the business they did as a firm, aside from the New York Kerosene Oil Company, could be ascertained by those books?

A. Yes, sir.

Q. You stated that the New York Kerosene Oil Company had no account of bills receivable; had they any account of bills payable in their books?

A. I am not quite sure but there might be such an account on the ledger; but I had very seldom any occasion to use it.

Q. Won't you look and see?

A. [Witness examines the ledger.] There is an account of bills receivable, and bills payable; the account of bills receivable, the last entry was in March, 1864, and in bills payable February, 1863.

Q. My question, and my previous question, relate and related to the years 1867, 1868, and subsequent years; at that time there was no account of bills payable or receivable in the books of the New York Kerosene Oil Company?

A. Only this account; no active account.

Q. And hadn't been since March, '64, as to bills receivable, and December 21, 1863, as to bills payable?

A. No, sir.

Q. Then any bill or note made in the name of the New York Kerosene Oil Company, by any officer of that company, after December, 1863, was not a subject of any entry in their books?

A. I never knew of any note being made by the New York Kerosene Oil Company.

Q. If any was made, it was not a subject of any entry in their books?

A. I think it would have been, if any had been made.

67 Q. State whether or not there is any evidence in any of the books of the New York Kerosene Oil Company produced here of the giving or existence of any note, or bill of exchange, by the New York Kerosene Oil Company, at any time after December, 1863.

A. No, sir.

Q. In the schedule of creditors annexed to the bankruptcy proceedings there is a claim of Cooper & Hewitt, alleged to be secured by a draft of the New York Kerosene Oil Company, dated April 15th, 1867, payable 80 days after date. Is there an entry in the books of the New York Kerosene Oil Company of any such draft?

A. I never knew of it, but if there is I have forgotten it; there is no such entry to my knowledge.

Q. There is a claim of the Metropolitan National Bank of the city of New York for cash loaned, $27,000. Is there any entry of that in the books of the New York Kerosene Oil Company?

A. No, sir.

Q. Have you examined the schedule of creditors annexed to the bankruptcy petition?

A. I have looked at it a few minutes ago; yes, sir.

Q. State whether or not any of the claims specified in that schedule appear on the books of the New York Kerosene Oil Company.

A. They do not.

Q. In whose books do they appear?

A. I think there were but few of them that appeared on the books at all in the shape of bills; we never charged them till they were paid.

Q. In the case of Cooper & Hewitt, does that draft appear on the books of the company?

A. I think it does not.

Q. The loan by the Metropolitan Bank—does that appear?

A. Only in our bills payable of Cozzens & Co.

Q. And where these claims were founded upon paper, notes, or
68 acceptances on which Cozzens & Co. were liable, don't those all appear on the books of Cozzens & Co. as notes and acceptances given by Cozzens & Co.?

A. Not all of them; not until paid.

Q. Where they give a note or acceptance, don't that appear on the bills payable?

A. Yes, sir; I think it does.

Q. Where the claims against the New York Kerosene Oil Company are based upon paper issued by Cozzens & Co., that paper appears on Cozzen & Co.'s bills payable?

A. It only appears in a memorandum of bills payable, and no other entry is made until it is paid; no entry on the general ledger account book.

Q. And when paid it would be entered in the books of Cozzens & Co., in the account of bills payable?

A. No, sir; it would be changed at once to the proper account, as if it was a cash payment.

Q. After looking at the book of bills payable, and at the ledger of Cozzens & Co., can you now state or explain more fully in reference to the notes payable at the Metropolitan Bank?

A. This one you speak of now was an accommodation note, endorsed by Mr. Appleton; and from this record it was a note drawn by Cozzens & Co., and endorsed by Cozzens, as president, and also by William H. Appleton.

Q. And no entry of it was made in the books of the New York Kerosene Oil Company whatever?

A. No, sir.

Q. And according to the mode of doing business, until paid, it would not appear on those books, would it, of the New York Kerosene Oil Company?

A. Not at all.

Q. If it was for account of the New York Kerosene Oil Company it would finally appear on their books, wouldn't it?

A. If it was for account of the New York Kerosene Oil Com-
69 pany it would, when paid, have appeared in their books, by being charged to the company; but I never made an entry of that kind.

Q. Taking the case of the loan by the Metropolitan Bank, which they claim, in the schedule of creditors, to be a debt of the New York Kerosene Oil Company, and which the New York Kerosene Oil Company, by its petition, exhibits as a debt, I want you to explain how it is that that does not appear in any way upon the books of the New York Kerosene Oil Company.

A. I don't suppose it became a debt of the New York Kerosene Oil Company until Cozzens & Co. failed to pay it.

Q. If Cozzens & Co. hadn't failed to pay it, then, according to the mode of business, what entries would have been made in the books of Cozzens & Co., or of the New York Kerosene Oil Company, in respect to it?

A. When it was paid it would have been charged to the bills payable in Cozzens & Co.'s books, and no entry made in the New York Kerosene Oil Company's books.

Q. And none would have been required, the way the business was done?

A. No, sir.

Q. Because the New York Kerosene Oil Company were charged with all cash advances made by Cozzens & Co.?

A. Yes, sir.

Q. Now, you stated in your examination yesterday, that the several advances made by the New York Guaranty and Indemnity Company of $50,000, and $25,000, and $25,000, didn't appear in the books of the New York Kerosene Oil Company. Do those advances appear in the bills payable of Cozzens & Co. that you have there in your hand?

A. Yes, sir; I think it does.

Q. And also in the cash book of Cozzens & Co.?

A. Yes, sir.

70 Q. The entry in the cash book is under date of February 15th, and is as follows: "To bills payable, No. 105, discounted by the New York Guaranty and Indemnity Company, one and a half per cent. discount," on the cash book of Cozzens & Co.?

A. Yes, sir.

Q. The $25,000 advance, May 8th, 1867, appears in the cash book under that date, and the entry is as follows: "Cash, debtor, to bills payable, No. 117, discounted by N. Y. G. and Indemnity Company, three quarters per cent., $25,000;" and the third advance of $25,000, June 22d: "Cash debtor, bills payable, 120, discounted by the N. Y. G. and Indemnity Co., $25,000." State whether or not all the renewals appear in the book of bills payable and in the cash book of Cozzens & Co.

A. Not all of them. I think sometimes the interest was paid when it was due. Mr. Cozzens fixed it up, and I don't know whether the notes were exchanged or not.

Q. Then, if it was so, there was no occasion for any new entry in the cash book?

A. Most of them have entries made. I think Cozzens & Co.'s book of bills payable shows every renewal, with perhaps one exception.

Q. In Cozzens & Co.'s book of notes and bills payable, now before you, are not the drafts and notes made by A. M. Cozzens, president, and by Cozzens & Co. entered indiscriminately?

A. They are entered indiscriminately.

Q. In the account, as kept between Cozzens & Co and the New York Kerosene Oil Company, of cash advances, made by Cozzens & Co., is

there anything in the books of either Cozzens & Co. or the New York Kerosene Oil Company to show the sources from which Cozzens & Co. derived the cash so advanced?

A. There is nothing in the books of the New York Kerosene Oil Company, but there is something in the books of Cozzens & Co., although not in the books of the New York Kerosene Oil Company's account.

71 Q. State what there is in the books of Cozzens & Co.

A. In the cash book will be shown every entry of money received by Cozzens & Co.

Q. But money received by Cozzens & Co. by way of discount for their paper, or in any other mode, and out of which they made advances to the New York Kerosene Oil Company, would appear only in the books of Cozzens & Co.?

A. Yes, sir.

Q. And in the account of the oil company and the books of the oil company, nothing would appear except the amount of cash advanced to by Cozzens & Co.?

A. No, sir.

Q. Will you furnish a transcript of the entries in Cozzens & Co.'s book of the notes and bills payable from January 1st, 1867, and following?

A. I will.

Q. The proceeds of the several advances of the New York Guaranty and Indemnity Company went into the general bank account of Cozzens & Co.?

A. Yes, sir.

Q. And out of that general bank account Cozzens & Co. made their advances to the New York Kerosene Oil Company?

A. Yes, sir; in the way of paying their bills; it came out of Cozzens & Co.'s bank account.

Q. So that Cozzens & Co. were in fact the bankers of the New York Kerosene Oil Company?

(Taken, subject to objection.)

A. Yes, sir.

Q. They had no other bank account?

(Taken, subject to objection; on the ground that the question calls for a matter of judgment and conclusion.)

A. No, sir.

Q. And all the money used by the New York Kerosene Oil Company, in their business, came from Cozzens & Co.?

72 A. Not all of it; some of the money that was received at the works was paid out there.

Q. But that was all turned in to Cozzens & Co.?

A. Yes, sir.

Q. So that all the money came from Cozzens & Co.?

A. No, sir; sometimes it wasn't turned in; it was sometimes paid there without being turned in, but that was inconsiderable.

Q. It all went into the account?

A. Yes, sir.

Q. As I understand your evidence, and the accounts produced here, and books, there were no creditors of the New York Kerosene Oil Company in 1867, for cash loaned or advanced, except Cozzens & Co.?

A. None that I know of.

Q. I mean, according to the mode of doing the business adopted between Cozzens & Co. and the New York Kerosene Oil Company?

A. Only those small bills that remained unpaid.

Q. But in the regular course these would be paid by Cozzens & Co., and be charged by them to the New York Kerosene Oil Company?

A. Yes, sir.

Q. In what way would you ascertain, at any given time, how the accounts stood between Cozzens & Co. and the New York Kerosene Oil Company?

A. By posting the books up.

Q. In fact and in practice were the books posted up?

A. Yes, sir.

Q. And was the state of the accounts ascertained periodically?

A. Every month.

Q. Who did the work?

A. I did.

Q. Who did it in January, 1867?

A. Mr. Austin.

73 Q. George W. Austin, the then secretary of the New York Kerosene Oil Company?

A. Yes, sir; in January, 1867; I don't know but I may have done it then.

Q. Please look and see.

A. (After examination.) Mr. Austin did.

Q. Have you examined the accounts as made by him in the books of Cozzens & Co. and the New York Kerosene Oil Company?

A. Yes, sir.

Q. On the first of January, 1867, how did that account stand?

A. $158,201 $\frac{80}{100}$ the New York Kerosene Oil Company were debtor to Cozzens & Co.

Q. And that appears both in the accounts or books of Cozzens & Co. and in the books of the Kerosene Oil Company?

A. I suppose it must be on the books of the New York Kerosene Oil Company; I have not looked.

Q. Will you look and see?

A. (Witness examines the books.) The books of the New York Kerosene Oil Company agree with those of Cozzens & Co. in respect to the amount of the indebtedness on the first of January, 1867.

Q. And that balance represented the excess of the cash payments charged by Cozzens & Co. to the New York Kerosene Oil Company over and above all receipts credited to their account?

A. I shall have to think of that. (Reflecting a minute.) I think the transactions were all cash, except where the 7½ per cent. commission was charged by Cozzens & Co. With that exception they were all cash.

Q. This ledger balance of the first of January, 1867, by whom was that made?

A. George W. Austin.

Q. State how that is made up. What are the constituent items of that ledger balance?

74 A. They represent salaries, C. Wheeler's petroleum account of drafts drawn, the real estate account, and the kerosene oil accounts.

Q. What is this account of "C. J. Gibbs, superintendent"?

A. Those are for the purchase of oils; drafts of Gibbs for oil.

Q. "Gibbs, superintendent," doesn't mean superintendent of the New York Kerosene Oil Company?

A. No, sir.

Q. It means that he was superintendent of some other company that

drew notes for oils, for some account—that drew on Cozzens & Co. for oil?

A. Yes, sir.

Q. Did it represent oil actually on hand, and paid for?

A. It may not have been received; paid for, but not received.

Q. Was anything debited to that account except actual payments? According to the mode of keeping the accounts, this item of $66,849\frac{80}{100}$ in the ledger balance of January first, 1867, represents cash paid out for oil?

A. I know nothing about that account.

Q. Look at the account, and see if that is a cash balance.

A. I should say so, from the way the books were kept.

Q. The real estate accounts—the $350,000—represents the cost and repairs of the real estate?

A. Yes, sir.

Q. The actual cash outlay?

A. Yes, sir.

Q. Then the item of "kerosene oils" represents the cash outlay for oil?

A. Yes, sir; up to the first of January, 1867.

Q. Can you state whether this ledger balance embraces on the debit and credit side, balances of all the accounts at that time in the ledger?

75 A. I should think it did. I haven't examined it.

Q. Will you look at it, and verify it?

A. (After examination.) I have examined the books, and have no doubt that this account is correct.

Q. I propose to put in simply this ledger balance of January 1st, 1867, referred to by witness. (Put in evidence, and marked Defendant's Ex., No. 1, January 23d, 1873.) The "liability to J. B. Cozzens"—what is that for?

A. It is the salary of the superintendent of the works.

Q. And that to Cozzens & Co., $158,201\frac{80}{100}$, is the balance from the ledger?

A. Yes, sir; on that day to which I referred a little while ago.

Q. I now show you ledger balance to the first of February, 1867. Is this also in the handwriting of Mr. Austin?

A. Yes, sir.

Q. This is a correct transcript from the books?

A. I take it for granted; yes, sir.

(Put in evidence, and marked Defendant's Ex. No. 2, January 23, 1873.)

Q. I now show you the ledger balance to the first of March, 1867. That is also in the handwriting of Mr. Austin?

A. Yes, sir.

Q. And you have no doubt it is a correct transcript from the books?

A. Yes, sir.

(Marked Defendant's Ex. No. 3, January 23d, 1873.)

Q. The same as to the ledger balance to the first of April?

A. Yes, sir.

(Marked Defendant's Ex. No. 4, January 23d, 1873.)

Q. The same as to the first of May, also?

A. Yes, sir.

76 (Marked Defendant's Ex. No. 5, January 23d, 1873.)

Q. The ledger balance now shown you to the first of June, '67, is in your own handwriting, is it not?

A. That is signed by me. It must be a copy of the original. I signed that "G. W. Austin, secretary."

Q. This ledger balance shows the liability of the New York Kerosene Oil Company to Cozzens & Co. to be $111,371 $\frac{97}{100}$. Is that statement correct from the books?

A. I have not examined it, but I suppose so. (After examination.) Yes, sir; that is correct.

(Marked Defendant's Ex. No. 6, January 23d, 1873.)

Q. Explain that statement at the foot of it—how it is made up there?

A. Well, this statement involves a very long story.

Q. I mean what those items represent?

A. Those are a memorandum to show the profits of the works at the end of each month.

Q. Just state what these items are?

A. These are a list of unpaid bills for stock on hand; the difference between the balance deficiency at the end of each month shows profit or loss.

Q. The balance "deficiency" means the deficiency on the first of June, 1867, of the assets of the New York Kerosene Oil Company, as compared with their liability?

A. Yes, sir; between the debits and credits is the sum total, showing the condition of the New York Kerosene Oil Company, and the figures below show the difference in the deficiency from one month to another.

77 Q. The pencil figures below show that the deficiency in the assets of the company which existed on the first of May, 1867, had been reduced during that month by $338 $\frac{67}{100}$?

A. Yes, sir.

(Marked Defendant's Ex. No. 7, January 23, 1873.)

Q. I show you ledger balance to July first, 1867. Was this made by you?

A. Yes, sir.

Q. And it is correct?

A. Yes, sir; I suppose so.

(Marked Defendant's Ex. No. 8, January 23d, 1873.)

Q. Look through those ledger balances now shown you from August 1st, 1867, to December 1st, 1867, inclusive. Are they in your handwriting, and are they correct?

A. Yes, sir; as near as they can be, from the books.

(Marked respectively Defendant's Exs. Nos. 9, 10, 11, 12 and 13, of January 23d, 1873.)

Q. Every figure on those ledger balances corresponds with the figures on the books?

A. Yes, sir; unless there was some error in checking off. They were always proven.

Q. Was there any ledger balance made up for the first of January, 1868?

A. I think there was, but it doesn't appear to be *be* here.

Q. Can you make up one similar to those made at the office every previous month?

A. Yes, sir; and I will do so.

Q. Was any ledger balance made up after that time?

A. No, sir, I think not; Cozzens & Co. failed in the latter part of January, and we made up no balance after that time.

Q. One general question as to these ledger balances: If the books of Cozzens & Co. show the New York Kerosene Oil Company debited

78 at the end of each month, with the same balance that the books

of the New York Kerosene Oil Company show Cozzens & Co. to be credited with; and those amounts are correctly stated in each of those ledger balances in respect to which you have testified, from January 1st, 1867, to December 1st, 1867?

A. Yes, sir.

Q. Wasn't George C. Gibbs, superintendent, the superintendent of the "Dennis Run Oil Company?"

A. I always supposed so.

Q. He is the person who drew the drafts?

A. Yes, sir.

Q. What was the nature of the account between the New York Kerosene Oil Company and George C. Gibbs, superintendent?

A. They purchased oil from the Dennis Run Oil Company, which amounts were charged, and drafts drawn on Cozzens & Co. for it.

Q. And paid by Cozzens & Co.?

A. Yes, sir.

Q. And the several balances, in the ledger balances of G. C. Gibbs, superintendent, represent the amount of drafts drawn by Gibbs, superintendent, on Cozzens & Co., and paid by them?

A. Yes, sir.

Q. The oil so purchased went to the works of the New York Kerosene Oil Company?

A. Yes, sir.

Q. And the items on the debit side of that account in the New York Kerosene Oil Company's books, show the actual payments by Cozzens & Co. on those drafts, do they not?

A. Yes, sir; I don't know that they are all of them, but I think so, however?

Q. What was the amount paid by Cozzens & Co. of such drafts of George C. Gibbs, superintendent, for oil for the New York Kerosene Oil Company, during the month of February, 1867?

79 A. (After figuring). According to the books I find for February, $41,638\frac{50}{100}$.

Q. How much in March?

A. $42,069\frac{30}{100}$; it is charged to that account of Gibbs, superintendent.

Q. That includes, besides, payments of freight?

A. Yes, sir; to the Western Transportation Company—their charges for freight.

Q. These payments were in addition to all other cash disbursements of Cozzens & Co., during February and March, to the account of the New York Kerosene Oil Company—in addition to the other cash disbursements—whatever they were?

A. Yes, sir; but it is included in the sum total; they went into Cozzens & Co.'s account with the New York Kerosene Oil Company.

Q. And formed a part of the general balance exhibited in the ledger balance of the six months, respectively?

A. Yes, sir.

Q. And were paid out of the general bank account of Cozzens & Co.?

A. Yes, sir.

Q. These debts alleged to be due by the New York Kerosene Oil Company to Mr. William H. Appleton and others, of accommodation endorsement for the New York Kerosene Oil Company, and cash loaned, have you any knowledge as secretary of the company of these transactions, or had you at the time?

A. I knew the notes were endorsed by Mr. Cozzens.

Q. As president?

A. That I did not know.

Q. I ask you whether, as secretary of the New York Kerosene Oil Company, you had any knowledge at the time of the endorsement by Mr. William H. Appleton, or any other person named in the schedule as a creditor of the company for the account or accommodation of the company?

80 A. No, sir; I had not.

Q. Had you knowledge at the time of the extent to which Mr. Cozzens or Cozzens & Co. used the credit of the New York Kerosene Oil Company in any transaction?

A. No, sir.

Q. You had no more knowledge or acquaintance with reference to the transactions with Mr. Appleton or any other party claiming to be a creditor of the New York Kerosene Oil Company than you had in respect to the transaction with the New York Guaranty and Indemnity Company?

A. Not in relation to those matters with Mr. Cozzens; I knew nothing about them.

Q. But as to the credit of the New York Kerosene Oil Company being negotiated or used in any of those transactions?

A. I didn't know it at the time.

Q. Don't you know that he endorsed as president?

A. I knew that he had done it; I knew he did it.

Q. You knew at the time he did it?

A. Yes, sir; but I don't know when he did, or in whose favor.

Q. Did you know of the making of this mortgage at the time?

A. Not at the time.

Q. When you became secretary, and while you continued to act as secretary, who was the attorney for the New York Kerosene Oil Company, if they had any?

A. If they ever had any it was Mr. Southmayd; I didn't know that they ever had any.

Q. You know who acted with Mr. Cozzens, or Cozzens & Co., in reference to legal matters?

A. Mr. Southmayd.

Q. Did Mr. Lyon?

A. I never heard of the gentleman.

Q. No part of the advances made by the New York Guaranty

81 and Indemnity Company—either the $50,000, or the $25,000, or the subsequent $25,000—were credited in the books of Cozzens & Co., or anywhere to Mr. Cozzens, individually?

A. No, sir.

Q. Did you have charge of the stock ledger and transfer book—the stock transfer book—of the New York Kerosene Oil Company?

A. I did, after Mr. Austin's death.

Q. They are here in court, are they not?

A. I believe they are.

Q. I want you to state the number of shares of stock of the New York Kerosene Oil Company standing in the name of Abraham M. Cozzens on the 15th of February, 1867?

A. The actual transfers of stock don't seem to be entered in the transfer book; they were 3,590, according to the stock ledger.

Q. The total number of shares was 5,000.

A. Yes, sir.

Q. And at that time who held the residue?

A. E. Cooper, 273; Eli Kelly, 65; A. S. Hewitt, 273; Peter Cooper, 694; F. H. Cozzens, 50; Charles L. Wheeler, 5; James E. Kelly, 5; G. W. Austin, 2; James Austin, 43; which, with the 3,590 owned by Mr. Cozzens, made up the 5,000 shares.

Q. State whether the stock continued to be so held during all the year 1867.

A. Yes, sir; I think there was no change in 1867.

Q. Subsequent to February 15, 1867, what transfers, if any, of the stock were made?

A. John Perkins, one share; Ogden Haggerty, one share; John H. Hall, one share; F. H. Cozzens, one share.

Q. These shares were transferred by James E. Kelly, and his certificate was cancelled?

A. Yes, sir; leaving one share standing in his name. His certificate for five shares was canceled, leaving one share standing in his name.

82 Q. In whose custody and possession were the stock ledger and transfer book prior to your appointment as secretary?

A. They were in the safe, under the control of Mr. George W. Austin.

Q. In the safe of Cozzens & Co.?

A. Yes, sir.

Q. And subsequent to Mr. Austin's death they were in your charge?

A. Yes, sir.

Q. Kept in the same place until the appointment of the assignee in bankruptcy?

A. Yes, sir.

JANUARY 24TH—11 a. m., 1873.

Q. Look at the paper now shown you and say in whose handwriting it is.

A. Mr. Austin's, secretary of the company at that time.

Q. Do you know that to be the seal of the New York Kerosene Oil Company affixed to it?

A. Yes, sir; and that is Austin's writing.

Q. The entire paper is in Austin's handwriting, except the certificate of acknowledgement by the notary?

A. Yes, sir.

(Marked, for identification, Defendant's Ex. A, Jan. 24th, 1873.)

Q. In the cash book of Cozzens & Co., under date of April 19th, 1867, this entry occurs: "By New York Kerosene Oil Company, acknowledgement of G. W. A., sec'y, to copy of the resolution for the mortgage, 318, $1.00." In whose handwriting is that entered?

A. In Austin's.

Q. What does the figures 318 refer to?

A. The page on the ledger, where it is posted; I find this charge of the one dollar posted on page 318 of the ledger of Cozzens & Co.

83 for the account of the New York Kerosene Oil Company, and debited to the company in the account, in Austin's handwriting.

Q. Did you hear Mr. Thomas M. Cozzens's testimony yesterday?

A. Yes, sir.

Q. In reference to the entries made by him, in the books of Cozzens & Co., of the bill of Barney, Butler & Parsons, $262.49?

A. Yes, sir.

Q. Who made the entries in the books of the New York Kerosene Oil Company in reference to that charge?

A. That is my entry; I made it.

Q. Just state what entries there are in those books.

A. The first entry is in the journal, page 222, under date of New York, May 31st, 1867, expense account, Barney, Butler & Parsons, examining title, $262.49. This was taken from the monthly statement of the disbursements, or bills furnished by Cozzens & Co.

Q. And from this journal it was posted to the ledger of the New York Kerosene Oil Company?

A. Yes, sir.

Q. As a credit in the account of Cozzens & Co.?

A. Yes; but only in the sum total; it was in the general expense account, and at the end of six months it was charged or debited to Cozzens & Co. The item was not specified only in the sum total.

Q. But Cozzens & Co. had credit for it in the books of the New York Kerosene Oil Company, with other items?

A. Yes, sir.

Redirect by Mr. Choate:

Q. But the entries in the books of Cozzens & Co., where made of this item, were made first?

A. Yes, sir.

Q. And this entry made by you seems to have been made at the end of the month?

84 A. Yes, sir.

Q. Was it made from the bills immediately or from the bills appearing on the books of Cozzens & Co.?

A. I made them from the bills and checked them off by the books afterwards.

Q. That must have been about the time you commenced keeping the books?

A. Yes, sir; among the first entries.

Q. You don't recollect receiving any instructions in regard to this particular item?

A. Not the slightest; no, sir.

Q. Finding a bill made out to the New York Kerosene Oil Company, and so carried in the books of Cozzens & Co., you would post it into the books of the New York Kerosene Oil Company according to the usual practice of keeping those books?

A. Yes, sir.

Q. Mr. Wheeler was generally down in the oil regions I think you have stated?

A. Yes, sir.

Q. How often was he at the office of the company?

A. He had no stated times; he used to come up occasionally.

Q. On business of the company?

A. Yes, sir.

Q. During the last year that the company was to work, in 1867, he was there occasionally?

A. Yes, sir.

Q. You are not able to state when, nor for how long a period?

A. No, sir; but he was there in the latter part of January, 1868, after he was telegraphed to about the suspension.

Q. I am speaking of the year 1867?

A. No, sir; I am not able to state.

85 Q. James E. Kelly, who appears on the record as one of the trustees. Was he often, during the year 1867, at the office?

A. I don't think he was there very often.

Q. Do you recollect of his being there occasionally while you was there keeping the books?

A. Yes, sir.

Q. You said, in your cross-examination, as I understood you, that where paper was put out of A. M. Cozzens, president, or Cozzens & Co., and bills payable were issued, that they didn't go into the books of Cozzens & Co. until paid?

A. Only where notes were given in payment of bills; but where the notes were discounted, as accommodation loans, they went into the books at once.

Q. Where any such paper of A. M. Cozzens endorsed by Cozzens & Co., or of Cozzens & Co. endorsed by A. M. Cozzens, was discounted or money got upon it the receipt of that money went into the books in the form you have stated to the credit of Cozzens & Co.

A. Yes, sir.

Q. There was both classes of paper out during the year 1867?

A. I never knew anything about the endorsement on these notes.

Q. You had no knowledge other than that which the book of bills payable shows.

A. That is all.

Q. And with regard to the negotiation of any such paper—the negotiations of loans, or discount upon it, you have no knowledge of the actual negotiation as between Cozzens & Co. and the parties making the loan?

A. No, sir.

Q. All you know is derived from the notes or drafts themselves, and the entries in the book of bills payable, and the entry of the moneys received upon that paper in the books of Cozzens & Co.?

86 A. Mr. Cozzens generally brought me the memorandum of a loan of that kind, and I made my entries accordingly, without giving the nature of the paper.

Q. That is, he would give you a memorandum of the amount and from whom received?

A. Yes, sir.

Q. Without giving you a statement of the names on the paper?

A. Yes, sir.

Q. Did you keep this book of bills payable?

A. The latter part of the time; yes, sir.

Q. See where your entries begin.

A. The most of it is in my handwriting. No. 118, June 15th, 1867, is the first one I entered.

Q. And all that follow are entered by you?

A. Yes, sir.

Q. You must then either have seen those pieces of paper, or had a memorandum from Cozzens of the details which are stated in this book, as to those which you entered here yourself?

A. I probably asked him the nature of it when I put it in the bill-book.

Q. You don't know that you ever saw them?

A. No, sir.

Q. Then your information as to the time of the bills, and of the other details on the book, must have been derived from information given by Cozzens?

A. I think I asked him. He would come and stand by me when I made the entries; that was usual in keeping the bills payable.

Q. You were asked, on your cross-examination, about the payments

of the commissions and interest on the loan, to whomever it may have been made, by the New York Guaranty and Indemnity Company?

A. Yes, sir.

Q. And you were asked about the checks that were given to you. Those were the checks of Cozzens & Co.?

87 A. Yes, sir.

Q. And how were those payments passed into the books of Cozzens & Co.?

A. They were charged to the interest account on Cozzens & Co.'s books.

Q. And they didn't go into the books of the New York Kerosene Oil Company?

A. No, sir.

Q. Do you know how long Cozzens & Co. had been receiving this commission of 7½ per cent.? Did you ever examine the books?

A. I never looked over the books to see that. I think they were charged on every renewal.

Q. You misunderstand me. The commission and guaranty for selling that Cozzens & Co. was allowed by the New York Kerosene Oil Company; how long had that commission been allowed?

A. I never examined the books; but it was so from the time I went there. I think it goes back to the organization almost.

Q. Was Mr. Cozzens president of this company as long as you were there?

A. Yes, sir.

Q. I don't quite understand what this item in the ledger balances of "G. C. Gibbs, superintendent," is. It occurs in all these ledger balances.

A. Yes, sir; nearly all of them. It was for the purchase of oil down at the Dennis Run Oil Company, at Tidiout, and when a draft was drawn for the oil, or a check given for the freight, the check was given by Cozzens & Co., and it was charged to that account.

Q. And all those transactions were kept distinct, were they, both in the books of the New York Kerosene Oil Company and on the books of Cozzens & Co., from other payments made by Cozzens & Co.?

A. Not on Cozzens & Co.'s books. I separated them afterwards, so as to get the exact amount paid.

88 Q. Then Gibbs was acting in this business under a contract with the New York Kerosene Oil Company?

A. With Cozzens & Co.

Q. And the object of separating them was that it might be seen how that account stood with Gibbs?

A. Yes; to know the amount of each draft he drew, and to see how much the oil cost here.

Q. And this amount, 66,849.60, is the balance against Gibbs?

A. There was no credit to that account at all. That is merely the debit; because that oil was refined and shipped off and sold, and no credit given to that account. It was to show the amount of the drafts.

Q. And what does this item on the same ledger balance, of kerosene oils, represent, $240,596.44? The ledger balance of the first of January, 1867.

A. That account was there when I took hold of the books. I called it the profit and loss account.

Q. As you understand it showed a profit or loss on the oil up to that date?

A. All the expenses of refining the oil were charged to that kerosene oil account.

Q. All the bills paid by Cozzens & Co., and everything?

A. Yes, sir; the chemicals and labor, and barrels and cases, and everything of that kind.

Q. And that had been brought forward from what period? It says to the first of January, 1867.

A. It had been running all along from the beginning, so far as I know. If I could see the journal I think I could tell more about that.

Q. After referring to the journal, you state what went in the account of the kerosene oils?

A. Almost all the items that were paid by Cozzens would be aggregated at the end of each six months and charged into one account.

89 Q. All the items of the expenses of refining and reducing the oil?

A. Yes, sir; all went into that account.

Q. Then that account was an account of items that occur in the account of Cozzens & Co. with the New York Kerosene Oil Company?

A. Yes, sir.

Q. And it was continued along from month to month?

A. Yes, sir.

Q. The balance always brought forward from the preceding month?

A. Yes, sir.

Q. What were the credits for the account of the New York Kerosene Oil Company?

A. All the sales of the oil received by Cozzens & Co. on account of the New York Kerosene Oil Company were credited to the account of the New York Kerosene Oil Company at the end of each month.

Q. Those small accounts in the ledger balance of J. F. Waller and W. D. Cozzens, what were they—loans?

A. No, sir; salaries overdrawn.

Q. And they had been brought down from some former period into this account?

A. Yes, sir.

Q. Was "C. L. Wheeler, $565.00," of the same nature?

A. He had several accounts.

Q. Well, "C. L. Wheeler, petroleum account"?

A. That was an account he kept with the New York Kerosene Oil Company down at Tidiout?

Q. I suppose the object of opening that account was that it might be known at any time how the company stood with him?

A. Yes, sir.

Q. About that item of expenses of overpay to C. L. Wheeler—

90 that item went into the account of Cozzens & Co. with the New York Kerosene Oil Company; did it not?

A. Yes, sir; the money came from Cozzens & Co.

Q. You explained the real estate account; that account showed disbursements for the real estate up to this time?

A. Yes, sir.

Q. And you were asked with regard to the correctness of these ledger balances, and you stated that they were correct as to those made up before your time by Mr. Austin; you have verified them with the books?

A. As near as I can; yes, sir.

Q. What you mean, then, by saying that they were correct was that they were a correct transcript or result of the entries in the books of the New York Kerosene Oil Company?

A. I should infer that they were, although I have not examined them sufficiently to tell.

Q. You don't mean to speak of the correctness of the entries in the books of the New Yerk Kerosene Oil Company?

A. No, sir.

Q. In your answer that they were correct, you referred to their being correct transcripts or results of the books, and were not speaking with regard to the correctness of the original entries in the books?

A. No, sir; not at all.

Recross-examination:

Q. The interest account between Cozzens & Co. and the New York Kerosene Oil Company was a general account, was it not—a general interest account?

A. It was a running account; yes, sir.

Q. How was that account kept; for instance, how, at the end
91 of each month, in footing up the ledger balance, in favor of Cozzens & Co., would the item of interest appear?

A. I would compute the item of interest on each payment from the date of it, to the end of each month, and the credit also.

Q. There was but one general interest account as between Cozzens & Co. and the New York Kerosene Oil Company?

A. Yes, sir; only one account.

Q. That interest was charged by Cozzens & Co. on actual payments?

A. Yes, sir.

Q. Gibbs' drafts, that you speak of, were paid by Cozzens & Co. out of their general account, the same as any other disbursement?

A. Yes, sir.

Q. Also the freight?

A. Yes, sir.

Q. And those actual payments, when made, were charged by Cozzens & Co. in their account against the New York Kerosene Oil Company?

A. Yes, sir.

Q. But not until paid?

A. No, sir.

Q. And the outstanding drafts of Gibbs, running to maturity, wouldn't appear at all in the books until paid?

A. No, sir.

Q. In reference to the correctness of these entries, so far as it relates to entries made by yourself, did they at the time represent actual transactions?

A. Yes, sir.

Q. Is any entry in the books made by you, or made by Mr. Austin, or Mr. Thomas M. Cozzens, so far as you know, false or incorrect?

(Objected to. Taken, subject to objection.)

Q First, as to yours.

A. No, sir; no entry but what I think is correct.

Q. In the office?

92 A. Yes, sir; all that I made in the office I know are correct; and the other entries I made from the memorandum received from the works, I have every reason to suppose they were correct.

Q So far as you know, were the entries made by Mr. Austin and Thomas M. Cozzens correct and true, as representing the transactions which they purport to represent?

A. I am not familiar with their entries; but if I——

Q. You never heard the account impeached?

Q. You stated you took possession of the books in June?

A. It was about that time; as soon as my handwriting begins.

Q. If you knew in May, 1867, of the existence of the record on the book of minutes of the New York Kerosene Oil Company of this authority to Mr. Cozzens to make this mortgage?

A. I can't remember whether I did know or not.

Q. Then, so far as you recollect, you had, at the time these entries were made, absolutely no knowledge whatever in reference to making this mortgage?

96 A. I think not, sir.

Q. Is there any entry in the books of the New York Kerosene Oil Company in reference to any loan effected by Mr. Cozzens or Cozzens & Co., on behalf of the New York Kerosene Oil Company at any time?

A. Not to my knowledge.

Q. Were not Cozzens & Co. borrowing large sums of money from time to time?

A. Yes, sir.

Q. Could the business of the New York Kerosene Oil Company have been carried on without the aid of such loans?

(Objected to.)

Q. Without money borrowed could it at that time have been carried on?

(Taken subject to objection.)

A. No; I should say not.

Q. Did you know, at the time, to what extent Mr. Cozzens, as president of the New York Kerosene Oil Company, used the credit of that company?

A. No, sir.

Q. Any transactions which he made, resulting in loans, the avails of which went into the general account of Cozzens & Co., as you have described, did you know at the time how far he acted for the company, and gave the credit of the company, or the obligations of the company, or his own?

A. I did not.

Q. If Mr. Cozzens had told you that by authority of the board of trustees of the New York Kerosene Oil Company, and on behalf of that company he and the secretary of the company had executed the mortgage on the property of the company to any person, to secure a debt of the company, and had directed you to enter it in his books as a debit to the New York Kerosene Oil Company, the expenses attendant upon that transaction, would you have done it?

97 A. I should certainly have done it if he had told me.

By Mr. CHOATE:

Q. This book shown you is the book of bills payable and receivable of Cozzens & Co., is it not?

A. Yes, sir.

(Marked Ex. B, for identification, January 24th, 1873.)

Q. And this book is referred to in your testimony as the journal of Cozzens & Co.—the one now shown you?

A. Yes, sir.

(Marked Ex. C, for identification, January 24th, 1873.)

Q. You identify the book now shown you as the cash book of Cozzens & Co., and to which you have referred in your evidence?

A. Yes, sir.

(Marked Ex. D, for identification, January 24th, 1873.)

Q. You identify the book now shown you as the ledger of Cozzens & Co.?

A. Yes, sir.

Q. To which have you referred in your testimony?

A. Yes, sir.

(Marked Ex. E, for identification, January 24th, 1873.)

Q. You recognize the book now shown you as one of the check books of Cozzens & Co., beginning September, 1866, and running to February 1867?

A. Yes, sir.

(Marked Ex. F, for identification, Jan. 24th, 1873.)

Q. You recognize the book now shown you as another of the check books of Cozzens & Co., beginning in February, 1867, and running to September, 1867?

A. Yes, sir.

98 (Marked Ex. G, for identification, Jan. 24th, 1873.)

Q. You recognize the book now shown you as an another of the check books of Cozzens & Co., beginning in September, 1867, and running to January 28th, 1868?

A. I do, sir.

(Marked Ex. H, for identification, Jan. 24th, 1873.)

Q. Please look at the book now shown you, and see if you recognize that as the cash book of the New York Kerosene Oil Company?

A. Yes, sir.

(Marked Ex. I, for identification, Jan. 24th, 1873.)

Q. Look at the book now shown you, and state if you recognize that as the journal of the New York Kerosene Oil Company?

A. Yes, sir.

(Marked Ex. J, for identification, Jan. 24th, 1873.)

Q. Please look at the book now shown you, and state if you identify that as the ledger of the New York Kerosene Oil Company?

A. Yes, sir.

(Marked Ex. K, for identification, Jan. 24th, 1873.)

THOMAS M. COZZENS, sworn for complainant, and examined January 23d, 1873.

Direct examination:

Q. Where do you live?

A. Hustonville, Dutchess County.

Q. What is your business?

A. I am a farmer.

Q. You were formerly a member of the firm of Cozzens & Co.?

A. Yes, sir.

Q. Being a partner with your father in business?

A. Yes, sir.

99 Q. And you were a member of that firm up to the time of its failure, and your father's death, in 1868?

A. Yes, sir.

Q. How long were you a member of the firm of Cozzens & Co.?

A. From the formation of the partnership. I don't remember how long, or how many years; it was several years before.

Q. As many as four years?

A. At the formation of the New York Kerosene Oil Company.

Q. Did you ever hold any stock in the New York Kerosene Oil Company?

A. No, sir.

Q. Did you ever do any act as trustee of the New York Kerosene Oil Company?

(Taken subject to objection.)

A. Not that I remember.

Q. So far as you know?

A. No, sir.

Q. Do you recollect of ever being informed of your being appointed or elected a trustee?

A. I don't; but I cannot say positively I was not; but I don't remember of it.

Q. Have you any recollection whatever of attending any meeting of the trustees of the New York Kerosene Oil Company in March, 1867, at which action was taken in regard to executing a mortgage upon the property of the company?

(Taken subject to objection.)

A. I don't remember, I may possibly have been there.

Q. What was the first you knew of the fact of there being a mortgage on the works of the New York Kerosene Oil Company?

(Taken subject to objection.)

A. Hearing my father say that there was.

Q. Are you able to fix the time when you first heard him?

100 A. No, sir; I remember of the papers being drawn up; that is all I remember. I was in the office.

Q. What part of the business did you attend to personally?

A. The office, that was all. I didn't buy nor sell.

Q. Did you make any notes of Cozzens & Co. I mean any promissory notes, bills of exchange, or anything of that kind?

A. I may have signed them; but I never made any.

Q. Do you recollect signing them?

A. I know I have signed them.

Q. When?

A. Whenever there was any notes drawn up to sign they were brought to me, and I would sign them.

Q. They were brought to you by whom?

A. By whoever drew them up. Fowler or Austin, probably.

Q. To those you signed the name of Cozzens & Co.?

A. Yes, sir.

Q. Were any such notes drawn by you, except under the direction of Mr. Cozzens?

A. No, sir.

Q. And the same is true of any bill of exchange or draft?

A. Yes, sir.

Q. Who managed the business?

A. A. M. Cozzens.

Q. You had nothing personally to do with any negotiations for any advance by the New York Guaranty and Indemnity Company?

A. No, sir.

Q. What is your recollection in regard to any such meeting of trustees? Are you able to say whether or not? You say you may have been present at a meeting of the trustees?

A. Yes, sir.

101 Q. Have you any recollection whatever of any business transacted at any such meeting?

A. No, sir; I have not.

Q. Have you any recollection of being at such a meeting?

A. I have not.

Q. I understood you to say that, so far as you remember, you never did act as trustee?

A. So far as I remember, I don't think I did. My father brought a paper for me to sign, and I would put my name to it.

(This question and answer and what follows, taken provisionally.)

Q. Look at the entry in the cash book of Cozzens & Co., dated May 27th, 1867, "By New York Kerosene Oil Company, $262\frac{49}{100}$," and state if that is in your handwriting.

A. It is, sir.

Q. Now look at the corresponding entry, in the ledger of your company of the same date, and state if that is in your handwriting.

A. Yes, sir.

Q. Now, will you state what you had to do with keeping the books of Cozzens & Co.?

A. Mr. George W. Austin was taken sick, and for a few days, for a short time, until Mr. Fowler was engaged, I had to post up the books.

Q. At the same time did you make the original entries in the cash book?

A. I made the entries in both books.

Q. And according to your way in which these accounts were kept, this item in detail occurs only in the cash book and ledger?

A. Yes, sir.

Q. It doesn't occur in the journal?

A. No, sir.

Q. And this entry in the cash book is the first entry made in the books of Cozzens & Co. on that day?

A. Yes, sir.

102 Q. Do you recollect anything about making that entry?

A. No, sir; I merely know that I made it.

Q. Look at the check book of Cozzens & Co., Metropolitan Bank, under date of May 27th, 1867, and state in whose handwriting is the memorandum of a check drawn by the New York Kerosene Oil Company, to Barney, Butler & Parsons, $262\frac{49}{100}$?

A. It is my handwriting.

Q. You made that entry in the check book, and you drew a check for the corresponding amount to the order of Barney, Butler & Parsons?

A. Yes, sir.

Q. And the entry in the cash book was taken from the check book?

A. Yes, sir.

Q. And then from the cash-book carried into the ledger?

A. Yes, sir.

Q. You paid the bill, I suppose, of that date, and gave a check for it?

A. I suppose so.

Q. Look at that paper and see if that is the paper.

A. Yes, sir; I should judge so.

Q. Is it your handwriting on the back—a memorandum of yours on the back?

A. Yes, sir; that endorsement on the back is mine. This is the bill shown me, and the date of the payment is credited there by me.

Q. Have you any recollection of how you came to pay that bill?

A. No, sir.

Q. By whose direction was that bill paid?

A. I paid no bill except by the order of Mr. Cozzens.

Q. And having paid it, you made the usual entries in the book?

A. Yes, sir.

103 Q. Have you any recollection of receiving any instructions in regard to the form of entering in the book?

A. No, sir.

(Bill marked Ex. A for identification, January 23d, 1873.)

Q. In the course of your business in keeping those books, having paid a bill made out against the New York Kerosene Oil Company, you would enter it in the form in which you did?

A. Yes, sir.

Q. Did you have any knowledge of the matter of the charge contained in that bill?

A. I supposed it was something on account of some matter in the mortgage. I judge so now from seeing the bill. The bill speaks for itself.

Q. You had no knowledge of any transactions between your father and the New York Guaranty and Indemnity Company?

A. I merely know that there was a mortgage on the works; when and where, I don't remember.

Q, You don't know whether you knew there was a mortgage at that time?

A. I must have known it at that time.

Q. You are not able to state when you first knew of the mortgage?

A. No, sir; but seeing that bill I must have known at that time that there was a mortgage.

Q. See if that exhibit says anything about a mortgage. It doesn't use the word mortgage, does it?

(Witness reads the bill.)

A. No, sir.

Q. Are you able to say when you first heard of the mortgage now?

A. I think that was the time?

Cross-examination:

Q. What was your age in February, 1867—six years ago?

A. 29, about.

104 Q. Previous to your becoming a member of the firm of Cozzens & Co., what business were you in, if any?

A. Glassware; clerk.

Q. What was the name of the firm in whose employ you were?

A. Thomas T. Moore & Co.

Q. Had you ever had any knowledge of, or experience in the manufacture of oil?

A. No, sir.

Q. What business had your father been in prior to the formation of the firm of Cozzens & Co., of which you were a member?

A. Glassware.

Q. The firm of Cozzens & Co. was formed at the time the New York Kerosene Oil Company was incorporated?

A. Yes, sir.

Q. And as a part of the arrangement for doing the business of manufacturing oil, in the name of the New York Kerosene Oil Compay?

A. It was formed so that Cozzens & Co. could sell the oil, and get a commission.

Q. There had been a previous company, called the North American Kerosene Gaslight Company, hadn't there?

A. I believe so.

Q. You know the fact that your father was largely interested in that old company?

A. No, sir.

Q. He had not been interested in the old company?

A. Not that I know of.

Q. You knew the fact that the new company, the New York Kerosene Oil Company, was formed on the basis of the property of the North American Kerosene Gaslight Company?

A. Yes, sir.

105 Q. And the real estate of the New York Kerosene Oil Company came from the receiver of the company; didn't it?

A. Purchased at a receiver's sale.

Q. Were you present at that receiver's sale?

A. No, sir.

Q. Where was the office of Cozzens & Co., your firm?

A. No. 89 Water street first, and then at 134 Pearl street.

Q. What was your interest in the business?

A. It was pretty hard to tell; nominally it was down as one-sixteenth; when it amounted to a great deal I didn't get it.

Q. Was there any copartnership articles?

A. No, sir; when it amounted to a large sum, father says——

Q. No matter about that; there were no partnership articles?

A. No, sir.

Q. Your nominal interest was one-sixteenth?

A. Yes, sir.

Q. Where did you live during the time you were in that firm; with your father?

A. No, sir.

Q. How did you derive your means of support?

A. From the concern.

Q. You drew from the funds of Cozzens & Co.?

A. Yes, sir.

Q. The bulk of the business of Cozzens & Co. was that of the New York Kerosene Oil Company, wasn't it?

A. Selling oil for them; yes, sir.

Q. Had the New York Kerosene Oil Company any office except that of Cozzens & Co.?

A. No, sir.

Q. Do you recollect any meeting of the trustees of the New York Kerosene Oil Company held at any time?

A. I remember seeing gentlemen there; they said it was a meeting, but I had no interest in it.

106 Q. Where?

A. At 89 Water street.

Q. In the room where you were yourself?

A. Yes, sir; the early meetings were not there.

Q. But after the business got fully under way, was it not wholly managed by your father?

A. Yes, sir.

Q. Did you have anything to do with keeping the books or accounts except temporarily during the sickness of Mr. Austin?

A. No, sir.

Q. What had you to do as a member of the firm?

A. Sign checks when father was out, and pay the bills that he had left to be paid.

Q. And in all that you did you followed his instructions?

A. Yes, sir; as general superintendent.

Q. Did you do anything of your own responsibility?

A. No, sir.

Q. Cozzens & Co. paid bills for the New York Kerosene Oil Company, didn't they?

A. Yes, sir.

Q. There was nothing unusual in their paying this bill that has been produced here, was there?

A. No, sir.

Q. And as far as you know it was a valid claim against the New York Kerosene Oil Company, wasn't it?

A. So far as I knew; yes, sir.

Q. Now don't you recollect about the time of the payment of that bill, that your father told you that he was about making a mortgage upon the New York Kerosene Oil Company's property.

(Taken, subject to objection.)

A. No, sir; I don't remember particularly. He told me a good many times that I had no interest in the concern, and therefore it was none of my business.

107 Q. When did he tell you that it was none of your business?

A. Some year or so before he died.

Q. Was that in connection with any inquiry made by you in reference to the fact of the existence of a mortgage?

A. No, sir.

Q. Was it in connection with anything relating to the mortgage, or existence of a mortgage?

A. No, sir.

Q. I ask you again if, at about the time of the payment of this bill, your father didn't tell you that the New York Kerosene Oil Company had made a mortgage upon their property at Hunter's Point?

(Taken, subject to objection.)

A. I don't remember positively whether he did or not.

Q. What is your recollection?

A. I know he told me, but when or where, I have no recollection.

Q. Had you anything to do with the finances of Cozzens & Co.?

A. No, sir.

Q. Or kept yourself informed as to the state of their bank account?

A. Not particularly; father attended to it all himself.

Q. You had no responsibility?

A. No, sir.

Q. Did you know at the time of these advances being procured from the New York Guaranty and Indemnity Company; at the time they were procured?

A. I think I did.

Q. How did you know?

A. By seeing the check.

Q. You know that that money went into the general bank account of Cozzens & Co.?

A. If I looked at the book I did.

108 Q. Do you remember now that you did at that time have that knowledge?

A. I don't remember; but they are down there, of course; of course I endorsed it, and then I knew it.

Q. Haven't you a personal recollection of the fact that $50,000 was advanced by the New York Guaranty and Indemnity Company, which went into the general bank account of Cozzens & Co., in February, 1867?

A. Yes, sir.
Q. You knew at the time?
A. Of course I did; yes, sir.
Q. Did you know that at that time, in February, 1867, and March, 1867, the payments of Cozzens & Co., on account of the New York Kerosene Oil Company were very large?
A. I know that they were very large most of the time.
Q. Particularly during those months?
A. Yes, sir.
Q. Those payments were made out of the general bank account of Cozzens & Co., were they not?
A. Yes, sir.

Redirect:

Q. When was this meeting at the office, when you say you were present, and you understood it to be a meeting of trustees, in which you had no interest?
A. In the early part of it.
Q. Before the year 1867?
A. Yes, sir.
Q. Is that the only meeting of which you have any recollection of trustees?
A. Yes, sir.
Q. You stated in your cross-examination that you did nothing except by the direction of your father in this business? Didn't you
109 make entries in the books of routine matters in the office without asking him?
A. I copied from the check book into the cash book, and so on into the ledger, what I thought was correct, according to my judgment.

Recross-examination:

Q. But you paid no bills without his direction?
A. No, sir.
Q. Do you mean to say that after the early stages of the business, you have no recollection of any meeting of trustees of the New York Kerosene Oil Company being held at the office of Cozzens & Co.?
A. I have no distinct recollection; no, sir; they would come in and go into father's private office—the gentlemen would, and transact the business; I asked no questions.
Q. Did you ever see this book of minutes before?
A. I have seen it in the office.
Q. In whose handwriting is that "March 9th, 1867?"
A. George W. Austin's.
Q. Here it is stated in the minutes of this meeting, March 9th, 1867, that Thomas H. Cozzens was present. Have you any doubt that it is meant for you? You think it is meant for Thomas M. Cozzens?
A. Yes, sir.
Q. Austin was well acquainted with you?
A. Yes, sir.
Q. How can you account for that statement being signed, "Austin, secretary," if you were not present at that meeting?
(Taken, subject to objection.)
A. I may have been in the office; I was in the office every day.
Q. Can you swear positively that you were not present and acting at that meeting?
A. No, sir.

110 By Mr. CHOATE:

Q. Now will you state, having seen the record, what is your best recollection as to whether you were or were not present at such meeting?

A. I don't remember anything about it, one way or the other.

Hearing adjourned until to-morrow, Jan. 24th, 1873, at 11 a. m.

JANUARY 24th, 1873—11 a. m.

FRANCIS H. COZZENS, sworn for complainant.

Direct-examination:

Q. You are the son of A. M. Cozzens?

A. Yes, sir.

Q. And you live now in the city of New York?

A. Yes, sir.

Q. What was your business during the year 1867?

A. Had no business.

Q. You had no place of business?

A. No place of business.

Q. You were sometimes at the office of Cozzens & Co., I suppose.

A. Yes, sir; once in a while.

Q. Have you looked at this record on the minutes of the New York Kerosene Oil Company, purporting to be a record of the meeting of the trustees on the 9th of March, 1867?

A. Yes, sir; I have looked at it.

Q. Did you observe that your name is entered as one of the persons present?

A. Yes, sir.

Q. Were you present at such meeting?

(Objected to as irrelevant and inadmissible, on the ground that the complainant cannot attack the book of minutes, and generally as incompetent testimony in the cause. Taken, subject to objection.)

111 Q. Were you present at such a meeting, at that time?

A. No, sir; I don't remember any such meeting.

Q. Is your recollection so distinct as to inform you whether or not you were present at any meeting at which a vote was passed, or a resolution was passed, authorizing the execution of a bond on the works of the company?

(Taken, subject to same objection.)

A. I was not at any such meeting.

Q. When did you first know that there was a mortgage upon the works?

A. After the failure of the company.

Cross-examination:

Q. What was your age in 1867, Mr. Cozzens?

A. 28.

Q. Where did you live—where was your home?

A. I lived in Ninth street, New York.

Q. Didn't live with your father?

A. No, sir.

Q. You say you were not in business; do you mean to say you were independent of your father?

A. Yes, sir.

Q. Did you know of the organization of the New York Kerosene Oil Company at the time it was originally incorporated?

A. Yes, sir; I knew of it.
Q. Were you interested in it originally?
A. No, sir.
Q. When did you first become interested in it?
A. When I received the stock.
Q. When was that?
A. I don't remember that.
Q. From whom did you receive the stock?
A. I believe it was from my father.
Q. You say you received the stock; do you mean you received the certificate?
A. I never had a certificate in my possession.
112 Q. Did you ever pay any money for the stock?
A. No, sir.
Q. Can't you remember when you first knew that the stock had been transferred to you by your father on the books of the company?
A. No, sir; I cannot.
Q. How did you become apprized of the fact that you were a stockholder?
A. I don't know that either.
Q. You say you never received a certificate of the stock?
A. No, sir; I never received any.
Q. Did you ever sign a receipt for one?
A. I don't remember.
Q. Have you any recollection about that?
A. I have no recollection about it at all.
Q. If you had signed a receipt on the stock book—certificate book—of the company, would you be likely to remember it?
A. No, sir; I would not; it is so long ago. It was a small affair.
Q. Nothing about it to impress it on your recollection?
A. No, sir.
Q. Have you a present recollection of being informed by your father that he had transferred stock to you?
A. No, sir; I have no recollection of it.
Q. How, then, are you able to state that you were a stockholder?
A. Only since the failure I have been informed, I believe, that I was a stockholder.
Q. Then before the failure you didn't know that you were a stockholder?
A. I don't remember that I was. I may have known it, but I don't remember now whether I knew it or not.
Q. Do you mean to say that you have no present recollection that you knew that you were *were* a stockholder until after the failure of Cozzens & Co?
113 A. I think I did know that I was a stockholder, but where I got the information from or how I knew it I don't know. I had that idea.
Q. How did you derive that idea?
A. I don't know how I derived it. I had that impression, and I suppose I had been told so.
Q. But you have no present recollection of your father having told you that he had transferred stock to you?
A. No, sir.
Q. You have no present recollection of any act done by you as a stockholder?
A. No, sir.

Q. Or as a trustee?

A. No, sir.

Q. Didn't you know you were a trustee.

A. No, sir; I didn't; I don't think I did. I may have been informed of it, but have no recollection of being so informed.

Q. Did you ever do any act as trustee?

A. None that I remember.

Q. When you say that you were not present at a meeting of the trustees on the 9th of March, 1867, you speak from your general want of recollection of doing any act as trustee, don't you?

A. Yes, sir.

Q. Do you recollect being present at any meeting of the trustees at any time before the failure of Cozzens & Co.?

A. No, sir.

Q. After the failure of Cozzens & Co. did you assume to act as a trustee?

A. Yes, sir.

Q. How came you to do that?

A. To facilitate the settlement.

Q. Did you make any investigation to ascertain whether or not you were a trustee?

A. I may have asked the question.

Q. Of whom?

114 A. I don't remember now; some one in the office.

Q. And to the best of your recollection now, is that the first nformation you had that you were a trustee?

A. It was, to the best of my recollection.

Q. The annual statement of the New York Kerosene Oil Company, published in January, 1865, purports to have been signed by you, as trustee. Do you recollect signing that annual report?

A. I don't recollect it?

Q. No recollection of doing that?

A. No, sir; If I did sign it I don't recollect it now.

Q. You don't recollect of ever signing any annual report?

A. No, sir; I do not.

Q. Or of doing any act as trustee?

A. No, sir.

Q. Did you know how many shares of stock your father had transferred to you until after the failure—any recollection of ever being told?

A. I don't remember that at all. It has passed from my mind.

Q. And you never asserted any claim as a stockholder during your father's life?

A. No, sir.

Q. And never received any dividend?

A. Never.

Q. Is that your handwriting (showing witness stump of certificate of July 19th)?

A. Yes, sir.

Q. (This paper shown witness.) I read from the stock-certificate book of the New York Kerosene Oil Company: "No. 43, shares 50, issued to F. H. Cozzens; certificate surrendered in part; No. 2. New York, July 19th, 1864. Received certificate 43, July 19th, 1864. F. H. Cozzens." The witness says: "That is my signature, and I have no recollection of it."

115 Q. Then you did receive that certificate?

115 A. Yes, sir; I signed that receipt, but the certificate was kept safe. I have forgotten about it.

Q. Now, may you not, without remembering it, have signed the annual statement, as trustee, and done other acts?

A. Yes, I may have; but I forget about it.

Q. Can you account in any way for your want of recollection in regard to this receipt of the certificate of stock? (Referring to the stump in the stock certificate book.)

A. Only the length of time; that is all. It would make no impression on my mind at the time, being a small amount.

Q. Fifty shares of stock at one hundred dollars each, in a company with a capital of $500,000 was a small affair to you, was it?

A. It depends on how large the dividends were. I considered it a small affair at that time.

Q. Why did you consider this a small affair?

A. Because I hadn't heard of any large dividends.

Q. When was the company organized?

A. I can tell by looking at the book.

Q. Can't you remember?

A. About 1861, I think.

Q. Had there been any dividend between 1861 and 1864?

A. I think not.

Q. Any recollection?

A. I have no recollection of any.

Q. Do you recollect of any dividend at any time?

A. No, sir.

Q. As far as you recollect, there wasn't any dividend?

A. No, sir.

Q. Now, wasn't this whole matter of the New York Kerosene
116 Oil Company, and its property and affairs, so far as you knew, exclusively under the control of your father?

A. Yes, sir; during the last part.

Q. Did you not, at the time, understand that he owned substantially the whole stock?

A. Yes, sir; I so understood.

Q. Were you not frequently at his place of business?

A. Yes; I frequently stopped in to see him.

Q. Did you meet Mr. Austin there—George W. Austin?

A. He was always there.

Q. Did you meet Mr. Kelly sometimes?

A. For the last few years I didn't meet him there; in the early part of the business he used to be there.

Q. You recollect meeting him there?

A. Yes, sir.

Q. Can you be exact to the year, or days, or months?

A. No, sir; I know I didn't meet him there in the latter part of '65 and '66 because I was away.

Q. In the early part of 1867 where were you?

A. In New York.

Q. In the habit of coming to your father's office?

A. Yes, sir; sometimes.

Q. Can you say that in the early part of that year you didn't meet Mr. Kelly at your father's office—Mr. James Kelly?

A. I have no recollection of meeting him.

Q. Did you meet your brother at this office at that time—Thomas?

A. Yes, sir.

Q. Can you specify any day in the early part of 1867, when you were there, and met your father and your brother and Mr. Austin, or when you didn't meet them?

A. No, sir; I cannot.

117 Q. There is no day in the month of March, 1867, that you can specify now, as a day on which you didn't meet them at the office?

A. No, sir.

Q. Who first raised the question with you whether or not you were present in the office of your father with your two brothers and Austin on the 9th of March, 1867?

A. I don't remember who.

Q. No recollection of that?

A. No, sir.

Q. With whom have you conversed on that subject since this suit has been pending—since the failure?

A. Oh, with a great many.

Q. With Mr. Appleton?

A. No, sir; with Mr. Prichard.

Q. Mr. Prichard is Appleton's counsel?

A. Yes, sir.

Q. Is Appleton the executor of your father?

A. Yes, sir.

Q. This book of minutes contains a record of meetings held in March, 1868, after your father's death, at which you were present; do you recollect being present at these meetings?

A. Yes, sir.

Q. And you then acted as a stockholder and trustee, did you not?

A. Yes, sir.

Q. Now you had no more stock, or you had no other stock then, than you had before, had you?

A. No, sir.

Q. Were you one of the executors of your father?

A. No, sir.

Q. Do you know who were the executors?

A. William H. Appleton; that is the only one who served.

Q. You say you never heard of this mortgage until after your father's death?

A. No, sir; I never did.

118 Q. Did you hear of any other transaction of your father in reference to the New York Kerosene Oil Company?

A. No, sir; I never heard of any.

Q. You had no knowledge on the subject?

A. No knowledge at all.

Q. Then you were no more ignorant of this than of all the other affairs of the company?

A. No more.

Q. Your father swore before a magistrate when he executed this mortgage that he was authorized to do so by a vote of the board of trustees. Have you any knowledge as to that affidavit being true or false?

(Taken subject to objection.)

A. No, sir; I have not.

Q. That affidavit being in existence, you would assume it was true would you not?

(Taken subject to objection.)

A. I would assume it to be true; anything that I saw of his I would assume to be true.

Q. Just read the affidavit. (Witness reads the affidavit, and is shown the certificate of the notary public annexed to the original mortgage, marked for identification Ex. L., January 24th, 1873.) You assume that statement to be true?

(Taken subject to objection.)

A. Yes, sir.

Q. Even if it made your own recollection at fault?

(Taken subject to objection.)

A. Yes, sir.

Q. The Appleton to whom you refer—do you know the fact of his claiming to be a creditor of the New York Kerosene Oil Company?

A. Yes, sir; I have heard of it.

Q. Claiming to be a large creditor?

A. Yes, sir; I believe he is.

119 Redirect:

Q. When was your attention first called to this record in the book of minutes, after the failure? How soon after the failure was your attention called to this record of your being present at that meeting?

A. I don't remember how soon; but it was soon after.

Q. Was that the first time that you recollect having seen that record?

A. Yes, sir; the first time I recollect of seeing it.

Q. Was that statement in that record of the resolution passed there, in which you participated, a matter of surprise then to you?

(Objected to.)

Q. Was that the first that you heard or knew of there being such a resolution offered about a mortgage?

A. Yes, sir; that was the first I heard of it.

Q. Was it the first intimation you had of there being such a resolution passed, when you first saw the book of minutes?

A. That I can't say; when I——

Q. Was the first intimation you had of such a resolution obtained about the time you first saw that, after the failure?

A. Yes, sir; about that time.

Q. Your answer with regard to your not remembering to have acted as trustee related to the period before the failure, did it not?

A. Yes, sir; I so understood the question.

Q. Having looked at that receipt upon the certificate book, does that now recall to your mind the fact of your receiving such a certificate of stock?

A. I have an indistinct remembrance of signing the receipt of the certificate, which I had forgotten; now, I have an indistinct remembrance of signing the book.

120 Q. Have you any remembrance of taking the certificate?

A. No, sir; I have not.

Q. You have not looked among your papers?

A. No, sir; I am confident I have not. I would have remembered it if I had taken the certificate.

Q. If you had been present at a meeting of trustees at which a resolution was passed, authorizing a mortgage of a hundred thousand dollars on the works of the company, wouldn't you have remembered it?

A. I can't say about that.

By Mr. BUTLER:

Q. But for seeing your name signed here on this book, you would have had no recollection at all of having done that act?

A. No, sir; I would not.

Hearing adjourned until January 28th, 1873, at 11 a. m.

JANUARY 28TH, 1873—11 a. m.

Hearing resumed; both sides present.

It is admitted by the complainant that Frank H. Cozzens, the last witness, signed an annual report of the New York Kerosene Oil Company, filed in the office of the clerk of Queens County, January 27th, 1865, as trustee; and also, as trustee, signed the annual report of said company, filed in the said office January 25th, 1867; both the original reports being produced by the defendant's counsel, and the signature of Frank H. Cozzens thereto, respectively, is admitted to be genuine.

On Mr. Fowler's cross-examination he was asked to make a copy of part of the book of bills payable. Said copy produced by him and marked Ex. No. 1, January 28th, 1873.

Hearing adjourned until January 29, 1873, at 11 a. m.

121 JANUARY 29TH, 1873—11 a. m.

Hearing resumed; all parties present.

JAMES E. KELLY sworn for complainant.

Direct examination by Mr. CHOATE:

Q. You reside at Brewster's Station, New York?

A. Not at the station; at the town of Southeast.

Q. Where did you live in 1867?

A. In the same place.

Q. You are the president of the New York Kerosene Oil Company?

A. Yes sir; I believe so.

Q. You continue to act as president since the bankruptcy?

A. Yes, sir.

Q. You were one of the trustees during the year 1867?

A. By the books I appeared to be one.

Q. Previously to that year you had been acting as trustee, had you not?

A. Yes, sir.

Q. When did you first learn of the existence of a mortgage to the New York Guaranty and Indemnity Company upon the works of the New York Kerosene Oil Company?

(Objected to as irrelevant and incompetent. Taken subject to objection.)

A. After the decease of Mr. Cozzens.

Q. When did you first learn of the existence on the records of the New York Kerosene Oil Company of a record of a resolution authorizing the execution of a mortgage?

(Taken subject to same objection.)

A. It was after his decease.

Q. Had you any knowledge up to that time of the passage of such a resolution by the board of trustees?

(Taken subject to same objection.)

A. No; not any.

122 Cross-examination:

Q. Were you a stockholder in the New York Kerosene Oil Company?

A. Not in my own right.

Q. If you were not a stockholder, how could you act as trustee?

A. I hadn't acted as trustee in the premises as I am aware of.

Q. You state that your name appeared on the books as trustee. Was that with your knowledge and consent?

A. Not with my knowledge or consent. I have ascertained Mr. Cozzens transferred five shares and elected me trustee.

Q. When did you ascertain that fact?

A. I may have known of that previous to his decease; but I am not positive about that.

Q. Have you any present recollection of having known that stock had been transferred to you, and that you had been elected trustee before his death?

A. I think Major Cozzens told me two or three years before his death. A. M. Cozzens, I mean.

Q. Can you fix the time?

A. I cannot.

Q. Can you recall any of the circumstances connected with his giving you that information?

A. Nothing further than something like this: That he had wanted to make a change in his trustees, and wanted somebody to fill up, and he transferred five shares of stock to me, and elected me trustee. That is about the whole of it. I am a brother-in-law of Mr. Cozzens, by the way.

Q. You never paid anything for the stock?

A. No, sir; nothing.

Q. Ever have a certificate?

A. Not that I am aware of, in my possession. He may have handed it to me by executing a power of attorney, or something of that kind. I have no present recollection of it.

123 Q. Did you ever sign a receipt for a certificate?

A. I may have done so, possibly; I can't say.

Q. No recollection of it?

A. I can't say, without looking at the records.

Q. During Mr. Cozzens' life did you ever do any act as trustee?

A. I may have done so; I can't say. I think very likely I did.

Q. Did you ever attend any meeting?

A. I have an impression that I did.

Q. You can't tell when, nor where?

A. No, sir; if I ever did it was in New York, of course—either in Water street or in Pearl street; but my recollection is only of Water street if I did. My recollection is that I did in the Water street office, but I cannot fix the time.

Q. If the book of minutes stated you to be present at any time, would that refresh your recollection?

A. That might bring it to my mind, perhaps.

Q. I understood you to say that you had no pecuniary interest in the New York Kerosene Oil Company?

A. No, sir.

Q. Nor its property?

A. I had, originally; but only through him; the stock always was represented by him. But I sold it long before his death.

Q. When did you part with the stock which you originally were interested in through Mr. Cozzens?

A. I can't tell you the year.

Q. Before 1867?

A. It was probably—let me see—I should say it was as early as 1864, probably; I should say so.

Q. After that you had no pecuniary interest whatever in the company, or its property, or affairs?

A. No, sir.

124 Q. It made no difference to you whether it made a mortgage or not, pecuniarily?

A. No, sir; not pecuniarily.

Q. Who is Eli Kelly?

A. That is my father; he is deceased.

Q. When did he die?

A. He died, I think it is five years ago last August.

Q. Died before Mr. Cozzens?

A. Yes, sir; I think it is five years this February; I may be wrong a year.

Q. He died before Mr. Cozzens?

A. Oh, yes.

Q. You say you were a brother-in-law of Mr. Cozzens—you mean that you married his sister?

A. No, sir; he married my sister.

Q. Did he have the entire control of the affairs and property of the New York Kerosene Oil Company, so far as you knew?

(Taken, subject to objection.)

A. Well, that I can't say; when I knew anything about it, it was in the hands of the board of directors and trustees, and so on, originally; so far as my connection was——

Q. To whom did you sell your original stock—what you originally had?

A. To Mr. Cozzens.

Q. It never stood in your name?

A. No, sir.

Q. Were you not aware after you had sold your interest in the stock to Mr. Cozzens, that he was the owner of the bulk of the stock; didn't you know that fact?

(Taken, subject to objection.)

A. My impression was that the major was not the majority stockholder.

Q. Did you learn it afterwards?

(Taken, subject to objection.)

A. But I heard afterwards by hearsay that he was by purchase.

125 Q. Then you say that you were originally interested; do you mean that you were interested at the time that the property of the North American Gaslight Company was sold?

A. The old Delmonico purchase, we called it; yes, sir.

Q. You were one of the original purchasers of the property of the North American Gaslight Company?

A. Yes, sir; I don't know it by that name; it was always told to me as the Delmonico coal interest.

Q. But it was the works and property at Hunter's Point?

A. Yes, sir; and called the New York Kerosene Oil Company.

Q. Were you one of the original corporators of the New York Kerosene Oil Company?

A. No, sir; I think I was not named as an incorporator.

Q. How did you acquire an interest?

A. Only through Cozzens.

Q. And the New York Kerosene Oil Company was started on the basis of that property at Hunter's Point, was it not?

A. As far as my knowledge is concerned, yes, sir; the property and personal effects; there was a large amount at that time of Scotch Boghead coal.

Q. That was all their property, was it?

A. Yes, sir; property embraced in it.

Q. And that property consisted of the works and the oil, and the coals, and other things at Hunter's Point, turned into the New York Kerosene Oil Company; and to what extent did that property represent the capital of the New York Kerosene Oil Company?

(Taken, subject to objection.)

A. That I can't tell.

126 Q. If it stated in the annual statement of the company that it represented $475,000 of the capital, would you say that that was correct?

A. I should, sir.

Q. Did the company have any cash capital, so far as you know, at the beginning?

A. Yes, sir; I think there was a cash contribution.

Q. How much?

A. My recollection is 25 or 50 thousand dollars; I cannot tell you which sum—one or the other.

Q. Did you make any cash contribution?

A. I got my stock after it was organized.

Q. But paid no cash?

A. I paid cash for my stock to Cozzens.

Q. And afterwards sold that to Cozzens?

A. Yes, sir.

Q. And during the time that you held that stock, or an interest in the stock, you did not act as a trustee? You were not a trustee then, were you?

A. I think not. I may have been elected a trustee by his transfer of five shares of stock, previously; but I can't say in regard to that.

Q. (By Mr. Choate.) Previous to your selling to him?

A. Yes, sir.

Cross-ex. resumed:

Q. You cannot recollect now whether the information that he gave you, that he had transferred the stock to you, was before the sale of your stock or not?

A. My impression is it was; and I then sold to him. It came in this shape: he purchased from outside parties, and he wanted some outside party to make up the board of trustees, and that is why he transferred the five shares. That is my impression.

Q. Did you know at that time, and subsequent to your sale, who the other trustees were?

127 A. I may have incidentally known, only as I heard from other parties.

Q. Did you make any objection to his making you a trustee in that way?

A. I don't know as I did.

Q. Do you know whether you incurred any liabilities by being a trustee?

A. I do not.

Q. You didn't give that a thought?

A. No, sir.

Q. You relied entirely upon him, I suppose?

A. I didn't give it any thought one way or the other. The way I stood with the company I didn't give it any thought.

Q. It was your confidence in him which explains that you gave it no thought; and your relations to him?

A. Yes, sir; of course.

Q. Did you know how the New York Kerosene Oil Company got the necessary means to carry on its business?

A. During one winter I knew, because I was in the office of the New York Kerosene Oil Company—in Cozzens's office in Water street.

A. Do you mean that you were there in any capacity—connected with it?

A. He went to Europe. My sister was very sick, and he asked me to go there and take charge.

Q. What winter was that?

A. I am trying to bring it to my mind. It was before I got the five shares.

Q. In the year 1867, had you any knowledge on that subject?

A. No, sir; none whatever.

Q. Did you ever, as trustee, sign any annual statement or report of the company?

A. I think very likely I have. I couldn't say without seeing my signature.

Q. No present recollection of signing any before the failure?

128 A. No, sir.

Q. Had you any personal knowledge in the years 1865, 1866, or 1867 of the situation of the company financially—of the amount of its debts?

A. I should say not.

Q. After the death of Mr. Cozzens, and the failure of the company, did you assume to act as trustee?

A. At the request of Mr. Prichard.

Q. William M. Prichard?

A. Yes, sir; and Mr. William H. Appleton.

Q. Were you a stockholder of the company, otherwise than you have described?

A. No, sir.

Q. Had you any knowledge of the affairs of the company except what you derived from the information they gave you?

A. I came here and saw you and Mr. Wallace after Mr. Cozzens's death. That is all.

Q. And inquiries you made?

A. Of either yourself or Mr. Wallace. Of course, immediately after his death, I went to the office and made inquiries on that subject. There was nothing except the inquiries I made at that time, and Mr. Wallace was as active as I was, I guess, in looking up the matter. I came around here; and there was Mr. Prichard, and Mr. Wallace, and myself.

Q. To make inquiries——

A. In relation to the mortgage, and the situation of things generally.

Q. Then you were apprised then of the existence of this mortgage and the claim of the New York Guaranty and Indemnity Company as mortgagees?

A. Yes, sir; after his death.

Q. Did you make any affidavit in reference to the affairs of the company early in 1868, or in the summer of 1868?

A. No other than the report that Mr. Prichard's people may have asked me to sign and swear to.

129 Q. If you signed and verified any statement or report, purporting to state the amount of the existing debts of the company, was it at the request of Mr. Prichard?

A. It was at this office.

Q. And was it or not prepared there?

A. Yes, sir.

Q. You understood Mr. Prichard to represent Mr. Appleton, didn't you?

A. Yes, sir; as the executor of Cozzens.

Q. You didn't know how much the New York Kerosene Oil Company owed at the time of its failure?

A. No, sir.

Q. Did you ever know?

A. No, sir; not of my own knowledge.

Redirect examination:

Q. There was only one transfer to you of the five shares, as you have already described?

A. That is all I know of.

Q. And from the time that you received those five shares—some of them or some part of them—have they not stood in your name?

A. Yes, sir; they have stood in my name.

Q. You made no objection when Cozzens requested you to act as trustee?

A. No, sir.

Q. You understood that you were assenting to act as trustee at his request?

A. Yes, sir.

Q. But when you say that you had no pecuniary interest in the company, you don't mean that you had such interest, whatever it may have been, as the holding of these five shares would give you?

A. I don't understand you.

Q. You stated, on your cross examination, that you had no pecuniary interest in the New York Kerosene Oil Company. Now, whatever interest the holder of those five shares had, you had, did you?

130 (Taken, subject to objection.)

A. No, sir; I claim that that was transferred to me by Cozzens to make me eligible as a trustee.

Q. You never gave any money for those five shares?

A. No, sir; that is what I mean to say, and that is the fact.

Q. How long during this winter that you speak of that you were at the office were you there in attendance when Major Cozzens was in Europe?

A. I was there from October till the following spring; I think so, from September or October.

Q. You are not able to fix the year?

A. No, sir.

Q. How many years, or how long was it before Mr. Cozzens' failure and death?

A. My opinion is that I was there in the fall and winter of 1862 or '3.

Q. As long ago as that?

A. Yes, sir.

Q. Was it at that time that Cozzens was president, or was Mr. John Appleton?

A. John Appleton was the treasurer; I can't tell you who was either president or vice president; I don't remember whether Cozzens was president or not.

Q. As to any statements of the financial condition of the company prior to the failure of Mr. Cozzens, which you may have signed, what, if any, inquiries or information did you get as to their truth?

A. If I signed them I believed them to be true from representations either made by Cozzens when presented, or Austin, the then secretary, or whoever may have presented them. I cannot say who may have presented them.

131 Q. At the time after the failure that I speak of, a statement being made up in Mr. Prichard's office, Prichard, Choate & Smith were the attorneys of the New York Kerosene Oil Company, were they not?

A. I believe they were.

Recross examination by Mr. BUTLER:

Q. How can you say that Messrs. Prichard, Choate & Smith were attorneys of the New York Kerosene Oil Company?

A. Mr. Prichard informed me so.

Q. Aside from that, have you any knowledge on the subject?

A. No, sir.

Q. Don't you know that Mr. William H. Appleton claimed to be a creditor of the New York Kerosene Oil Company?

A. I did not, of the New York Kerosene Oil Company; I believe he was a creditor of Major Cozzens personally.

Q. You didn't know that he claimed to be a creditor of the New York Kerosene Oil Company?

A. No, sir; I was not aware of it. I don't know that he is to-day. I thought his loans were all personal. That is the impression I had.

Q. It was at Mr. Appleton's request that you assumed to act as president of the oil company after its failure, and Mr. Prichard's request?

A. Yes, sir.

Q. Now, if you had known that Mr. Appleton claimed to be a creditor of the New York Kerosene Oil Company, would you have considered, as president, that Mr. Prichard, as attorney, could properly represent the New York Kerosene Oil Company also?

(Taken subject to objection.)

A. I should have thought so, from what I know of Prichard and Mr. Appleton.

Q. But you don't know the fact that Mr. Appleton claimed to be a creditor of the company?

132 A. If I have known it, it has pased from my mind. I may have known it, but if I have it has passed from my mind. I think he was an individual creditor.

Q. Did you do any act as president to retain Pritchard, Choate & Smith as attorneys for the company?

A. Only through general conversation with——

Q. You never paid them any money?

A. No, sir.

Q. You understood that Mr. Appleton was footing the bills, didn't you?

(Taken subject to objection.)
A. No, sir; I didn't understand about it one way or the other.
Q. You did no act yourself?
A. No, sir.
Q. You paid no money?
A. No, sir.
Q. How this thing was arranged, you don't know?
A. No, sir.

Redirect examination by Mr. CHOATE:

Q. Didn't you employ Prichard, Choate & Smith to put this company into bankruptcy? Didn't you, as one of the board of trustees, or as president?
(Taken subject to objection.)
Q. What is your recollection about that? Didn't you employ them to put this company into bankruptcy—to wind up the affairs?
(Taken subject to objection.)
A. My impression is, in connection with the trustees—I can't name them—Prichard, Choate & Smith were employed to put this company into bankruptcy; that is my impression.
Q. And didn't you, also, with those trustees, employ Prichard, Choate & Smith to resist the foreclosure of this very mortgage?
A. It may have been talked over, but I can't say as to the question of employment.
133 Q. Your recollection is not very distinct as to these points?
A. No, sir.

By Mr. BUTLER:

Q. You knew at the time that Mr. Appleton was the prime mover of this thing?
(Taken, subject to objection.)
A. If you want me to answer that as I understand it, I say no; not the prime mover.
Q. Who was, then?
A. That he acted in concert, representing the interest of O. D F. Grant, himself, and Harry Stone. That was the general impression.
Q. That was the triumvirate?
A. That was the impression I had in regard to these movements.
Q. Do you know in what relation O. D. F. Grant and Harry Stone (by whom you mean, I suppose, Henry A. Stone) stood to the New York Kerosene Oil Company?
A. No, sir; I don't know the exact relations.
(Hearing adjourned until January 31st, 1873, at 11 a. m.)

JANUARY 31ST, 1873—11 a. m.

(Hearing adjourned until Tuesday, February 4th, 1873, at 11 a. m.)

Hearing resumed, February 4, 1873.

JORDAN H. FOWLER recalled for the complainant.

Direct examination by Mr. CHOATE:

Q. Mr. Fowler, you stated on your cross-examination that the entries in the book of bills payable, that the paper of A. M. Cozzens
134 president, and of Cozzens & Co., are entered in the book of bills payable?
A. Yes, sir.

Q. Will you look at the book of bills payable, and say if there are any entries of any paper there to which Cozzens & Co. are not parties, either as makers, drawers or endorsers?

A. (Witness looks at book and finds one here.) I know nothing about it, though.

Q. What date and number is that?

A. It was 'way back in 1864; a note of A. M. Cozzens, dated March 21st, 1864, in favor of Eli Kelley, on purchase of stock, on demand, $15,000; and there is one here, I know nothing about it, on November 7, 1867, on Edward G. Catlin, in favor of E. G. C., at 60 days, $2,400.

Q. With that exception, all the other drafts and notes entered in the book of bills payable are obligations in the same form of Cozzens & Company as they are entered there?

A. Yes, sir; they are all obligations of Cozzens & Company.

Q. You were asked in your cross-examination with regard to notes given to Cooper & Hewitt, the Metropolitan Bank, and William H. Appleton, the proceeds of which went to the credit of Cozzens & Company; will you give us the amounts and the dates of those receipts of money by Cozzens & Company?

A. I should have to refer to the books. I couldn't do it from memory.

A. (Witness looks at books.) October 30, 1867, was one, William H. Appleton.

Q. Go back and see if there is one in February?

A. April 15, Cooper, Hewitt & Company.

Q. Take this, then, April 15?

A. A. M. Cozzens, president, part of it on Cozzens & Company, for Cooper, Hewitt & Company, 80 days, $10,203, April 15; but I am not sure about this in this account, because it was before my
135 time there. I think the notes were given for a balance of an account on Cozzens & Company.

Q. Take another.

A. October 30, 1867, Cozzens & Company, in favor of Wm. H. Appleton, accommodation; I find in the check book, under date of October, 1867, a deposit note, endorsed by Wm. H. Appleton, discounted at the Metropolitan National Bank, for $30,000.

By Mr. BUTLER:

Q. That is in October, 1867?

A. In October, 1867, the amount of the deposit is $29,280.82.

By Mr. BUTLER:

Q. What was that Cooper & Hewitt date?

A. April 15th.

By Mr. CHOATE:

Q. Do you find any others?

A. Another one of William H. Appleton.

Q. What date is that?

A. October 22, 1867.

Q. What is the amount?

A. $5,000; it is a note of Cozzens & Company in favor of A. M. Cozzens, president, endorsed by William H. Appleton, discounted in the Metropolitan Bank; 3 notes, one of five, one of ten, and one of fifteen, October 22, November 7, and November 11, entered here, all of the same nature, the same kind.

By Mr. BUTLER:

Q. That is $30,000?

A. Yes, sir.

By Mr. CHOATE:

Q. The $5,000, note of October 22, is not found in the check book as a deposit; now what is the other date?

A. November 7th.

136 Q. Nor is that found in the check book as a deposit; what is the other date?

A. November 11th, $15,000.

Q. There is $15,000 here, but it is entered C. Balles?

A. That is not it; well, I should say this $30,000 is a renewal of that $30,000.

Q. Doesn't it say so; isn't it in the bill book?

A. No, sir; it can't be either.

Q. Do you find any other of these transactions?

A. What others?

Q. Cooper & Hewitt, Wm. H. Appleton, and Metropolitan Bank notes discounted at the Metropolitan Bank; you find no entries in the book of bills payable under date of February 26, 1867.

A. A note of Cozzens & Company, in favor of Wm. H. Appleton, discounted at the bank it is endorsed by Cozzens & Company and William H. Appleton, and discounted in the Metropolitan Bank, $30,000; and on the check book I find a deposit, under date of February 26, of $22,298.08, with reference to cash book, page 30.

Q. You cannot give us the Metropolitan Bank discounts?

A. I suppose they were the same thing, because they were endorsed by William H. Appleton, and entered here in the same way; they cannot be entered in this book.

Q. Have you given all that appears in the book of bills payable of the paper discounted apparently by Wm. H. Appleton, and the Metropolitan Bank, and Cooper & Hewitt?

A. There are no other entries, but apparently of renewals, and carried forward.

Q. You stated in your cross-examination there were one or two shipments made by the New York Kerosene Oil Company, on which there was a loss that was charged to the New York Kerosene Oil Company; there were several shipments made on account of the New York

137 Kerosene Oil Company; now can you state whether any shipments of oil, on which the loss was charged to the Kerosene Oil Company, had been entered in the book of Cozzens & Company, at the time of the shipment, as sales on which a commission of 7½ per cent. had been charged?

(Objected to as immaterial.)

A. They were all entered there at 7½ per cent.

Q. Where was that entry made—what book?

A. The 7½ per cent. commission; it was first entered in the journal.

Q. Was it entered in the sales book ot Cozzens & Co.?

A. The 7½ per cent. commission was not.

Q. These shipments were entered; the shipments were all entered in the sales book at the time of the shipments? (Objected to.) You have that sales book here?

A. Yes, sir.

Q. Will you identify it so that it may be referred to? Is this book shown you the sales book of Cozzens & Co.?

A. Yes, sir; that is the sales book.

Q. Now, will you turn to one of these transactions—one of these shipments on which there was a loss subsequently charged to the Kerosene Oil Company, which was at the time of shipment entered in the sales book; show us the entry; give the entry?

A. I had a memorandum of some of the shipments.

Q. You may refer to your memorandum, of course; you can look at that. Take the earliest one that you find, Mr. Fowler; read the entry from the sales book?

A. Burdsley & King, and Cozzens & Co., joint account. Shipment per brig Conquest, 52,122 net gallons, 60 cents, or 1,275 barrels of oil; total amount of shipment, $31,515.45.

Q. What does pd. there mean?

138 A. It means paid—the money advanced on it.

Q. Now, does it appear on the books of Cozzens & Co. that the 7½ per cent. commission was charged on that amount—$31,515.45?

A. I have not examined that particularly. (Witness examines books.)

Q. (By Mr. Butler.) What is the date of that shipment?

A. November 17th, 1865; yes, sir; 7½ per cent. commission has been charged on that.

Q. (By Mr. Choate.) On what date?

A. The 30th of November.

(The foregoing questions were all taken subject to objection.)

Q. Amounting to how much on this one sale?

A. That will be 7½ per cent. commission on the whole amount of the sale.

Q. Now, when was the charge of the loss on this shipment made against the Kerosene Oil Company?

A. As soon as the sales came in.

Q. Give me the date and the entry?

A. The loss was charged to the New York Kerosene Oil Company on the 23d of October, 1866.

Q. What was the amount of the loss?

A. The loss on the shipment was $2,683.43.

Q. Now, are there other similar transactions in the books, where such losses have been charged?

A. Yes, sir.

Q. Can you prepare a statement showing these several transactions, giving the date of the shipment, the name of the ship, the amount of the loss, and the date when that loss was charged to the New York Kerosene Oil Company?

A. Yes, sir; I can.

(Question objected to, and the witness is to prepare a schedule which is also subject to the objection.)

Q. This shipment by the Conquest was kerosene oil?

139 A. Yes, sir.

Q. Were there other similar shipments of nap'tha on which losses were charged to the Kerosene Oil Company, after a commission on the shipment had been charged as on a sale?

A. Yes, sir.

Q. Will you also prepare a schedule giving the same details?

A. Yes, sir.

(Same objection.)

Q. Do you desire to qualify or explain any part of the evidence you have given with regard to these accounts on your cross-examination?

A. I should like to say that the transactions—the entries—were of ac-

tual transactions, and the entries were proper so far as I had any knowledge of the transaction itself.

Q. You don't mean by that to give an opinion that the entry of this transaction was proper?

A. I can only merely state the facts as they appear; the conclusions may be drawn by others.

Q. And by whose orders and directions were those losses charged to the Kerosene Oil Company, so far as they were made by yourself?

A. By Mr. Cozzens; some of the entries were made by myself.

Cross-examination by Mr. BUTLER:

Q. Entries in the book of bills payable show that the notes were made by A. M. Cozzens, president, and endorsed by William H. Appleton as an accommodation endorser, and the money on those notes obtained from the Metropolitan Bank?

A. Yes, sir; I think most of it was obtained from the Metropolitan Bank; there may have been exceptions.

Q. In reference to all the notes upon which the name of William H. Appleton appears, so far as the book of bills payable shows, was not his endorsement an accommodation endorsement?

140 A. Yes, sir; unless in the first part there may have been something for the purchase of stock; that is a part in reference to which I have not examined.

Q. So far as the book of bills payable shows money due to the Metropolitan Bank, that money was for discount for paper, was it not?

A. Yes, sir.

Q. And such paper was either the paper of Cozzens & Company or A. M. Cozzens, president, endorsed by Cozzens & Company?

A. Yes, sir.

Q. How do you account for the difference between the amount of the notes, as entered in bills payable, and the amount received as proceeds in the check-book?

A. The difference is caused by the discount.

Q. In any case was the interest or discounts so deducted charged to the Kerosene Oil Company?

A. No, sir; not to my knowledge.

Q. You stated, in the course of your direct examination, that no part of the interest or discount paid to the Guaranty and Indemnity Company was charged to the Kerosene Oil Company; I understand you to say that the same is true in respect to the interest and discount of the notes for which Appleton was accommodation endorser, or which were discounted at the Metropolitan Bank?

A. Yes, sir.

Q. And the proceeds of all these notes went into the general bank account of Cozzens & Company?

A. Yes, sir.

Q. Now, in respect to these shipments, do the entries in reference to the shipments show that there were profits on some of them?

A. Yes, sir.

Q. When did Cozzens & Company begin to make shipments of oil manufactured by the Kerosene Oil Works for sale in a foreign market?

A. That was before I came there; I don't remember the date of the first shipment.

141 Q. To whom were those shipments made?

A. To parties on the other side—foreign houses at Liverpool and Antwerp.

Q. Anywhere else beside Liverpool and Antwerp?

A. Yes, sir; Hamburgh and a half a dozen European ports.

Q. Then it was a part of the regular business, as carried on, to make such shipments?

A. Yes, sir.

Q. As well as to make sales?

A. Yes, sir.

Q. And these, as I understand you, were shipments to consignees in foreign ports, for sale there on account of the Kerosene Oil Company?

(Objected to.)

A. I don't know that that was the case; I do not know but one entry, that was in the old books, that was entered in this way.

Q. Do you know whether or not these shipments represented sales or consignments for sale, on the other side?

A. In some instances we shipped direct to consignees on the other side, and in others we shipped through agents of foreign houses here in New York.

Q. In either case, or in both cases, were the shipments to these foreign parties sales to them, or consignments?

A. Consignments.

Q. Do you know anything about the terms on which those consignments were made?

A. Yes, sir; it is agreed upon the advances which should be made by the agents here in New York, or we used to draw for a certain per cent. from the consignees on the other side when we shipped direct.

Q. The advance procured on those consignments, were they credited to the Kerosene Oil Company?

A. No, sir; credited to the shipment.

142 Q. Credited to the shipment in account—the account being kept where?

A. Cozzens & Company's books.

Q. Then, as I understand, your separate accounts of each shipment were kept in the books of Cozzens & Company?

A. Yes, sir.

Q. And never went into the books of the Kerosene Oil Company except the net result?

A. The invoice value of the cargo of oil at the time of the shipment went into the books of the Kerosene Oil Company.

Q. In what account?

A. Under the head of sales.

Q. And the commission and the guaranty was charged on that invoice amount?

A. Yes, sir.

Q. At the time?

A. At the end of the month.

Q. And this was the case both in respect to actual sales and in respect to consignments to foreign houses for sale abroad?

A. Yes, sir.

Q. Now, in case the result of the shipments was a profit, did that in any way affect the commission and guaranty—did it increase the commission?

A. No, sir.

Q. It didn't affect it?

A. No, sir, not in the least. The commission was charged when the shipment was made.

Q. And wasn't increased if there was a profit, and was not deducted if there was a loss?

A. No, sir.

Q. Do you know when or where the arrangement was made between the Kerosene Oil Company and Cozzens & Co. as to their rate of commissions, or the way in which commissions should be charged?

A. I know nothing about it.

143 Q. Now, whether these shipments resulted in a profit or a loss depended, did it not, on the fluctuations of the foreign markets?

A. On the fluctuations of both markets.

Q. You mean home and foreign?

A. And the rate of exchange.

Q. State whether or not the advance on these shipments, as far as you know, and the sales made abroad, were by solvent houses?

A. Yes, sir; they were solvent houses.

Q. Do you recollect any instance where there was any loss except by reason of the market?

A. I don't know of any.

Q. Up to the time of the failure of Cozzens & Co., there was no other accounting between them and the Kerosene Oil Company than that which appears by the ledger balances, was there, to your knowledge?

A. No, sir.

Q. Has there been any since, between any representative of Cozzens & Company or of the Kerosene Oil Company, to your knowledge?

A. Not to my knowledge.

Q. Your testimony on this recross examination, in reference to shipments of oil, would relate equally to shipments of naptha, would it?

A. Yes, sir.

Redirect examination:

Q. Mr. Fowler, will you also prepare a schedule of the cases which you find in the books, where there has been a profit on similar transactions, which profit was credited to the New York Kerosene Oil Company?

A. Yes, sir.

Q. Mr. Fowler, were those losses that were charged against the Kerosene Oil Company charged in the first instance against the Kerosene Oil Company, or did they pass through some intermediate account?

A. Most of them passed through another account.

Q. What account?

144 A. Naptha account—Cozzens & Company.

Q. Will you let your schedule show how they were first charged and the date, and then the subsequent charges against the Kerosene Oil Company? Is this case of the consignment to which you have referred, in November, 1865, the earliest that you have found on the books?

A. I have not gone back any farther than that; it was the first I saw entered in the sales book; the first that I knew of.

Q. What is the date of the first one in which there was any profit, that you know of?

A. I couldn't tell the date; I think it was the "Doctor Bath;" I think the first profit was by the ship Doctor Bath.

Q. What date was that?

A. I cannot remember those dates; it is impossible.

Q. Your schedule will show that?

A. Yes, sir.

Q. You will bring your schedules down from the time of the "Conquest," will you, so far as these shipments were made while you were in the employ of Cozzens & Company. Do you know by whom and in what name the consignments were made—in whose name the consignments were made?

A. Cozzens & Co.

Q. Were those joint consignments, in which Burdsley & King had a joint interest, and in whose name were those consigned?

A. I think they were all Cozzens & Company; I don't remember receiving any account of sales but with Cozzens & Company.

Q. This intermediate account, through which these losses or loss and profits passed, which you referred to, was an account in the books of Cozzens & Company, not in the books of the Kerosene Oil Co.?

A. Yes, sir.

Complainant rests.

145 Defendant then called as a witness—

SAMUEL D. BABCOCK, who, being duly sworn, was examined by Mr. Butler, and testified as follows:

Q. Mr. Babcock, you are a merchant, residing in the city of New York?

A. Yes, sir.

Q. State generally how long you have been a merchant in this city, and cognizant of mercantile affairs.

A. Upwards of 25 years.

Q. In February, 1867, were you one of the directors of the New York Guaranty and Indemnity Company, the defendant in this suit?

A. I was, sir.

Q. Were you an officer of the company; chairman of the executive committee?

A. I was chairman of the executive committee.

Q. What business was that company carrying on at that time?

A. That of advances of money upon property and securities generally.

Q. Do you know anything about advances made by your company in 1867 on the property of the New York Kerosene Oil Company?

A. I was familiar with the transaction at the time.

Q. Had to do with it as chairman of the executive committee?

A. Yes, sir.

Q. Please state to whom, and when, and where, and by whom application was first made to the New York Guaranty and Indemnity Company for the advances you have referred to?

(Objected to as immaterial, irrelevant, and incompetent.)

A. Application was first made to myself, in February, 1867, at the office of my firm, No. 14 Broad street, by Abraham M. Cozzens.

Q. Who was Mr. Abraham M. Cozzens?

146 A. He was at that time president of the New York Kerosene Oil Company.

Q. State whether or not you had had previous knowledge of the existence and business of the New York Kerosene Oil Company and of Mr. Cozzens' connection with it.

A. I had known Mr. Cozzens for upwards of twenty years and knew of his being connected with this oil company for several years.

Q. Your office, I believe, was in the same building as that of the Guaranty and Indemnity Company, at that time?

A. Directly over the office of the company.

Q. Can you state more particularly the date of the application as connected with the first advance made by the company? It was a verbal application.

A. There could have been no advance at that time. No advance could have been made at the time Mr. Cozzens came to me.

Q. How was it as to being immediately previous to the advance; on the same day or a day or two?

A. The advance, I think, was made immediately afterwards.

Q. Then his coming to you was immediately before the advance was made?

A. Yes, sir.

Q. What passed between you and Mr. Cozzens; what statement, if any, did he make to you? State in your own way what occurred between you and Mr. Cozzens at that time.

(Objected to.)

A. Mr. Cozzens called upon me, supposing that I was the acting president, as I had been for some time before, of the New York Guaranty and Indemnity Company.

Q. He so stated?

A. He came to me as manager of this company, supposing that I had full power to do anything I chose in the matter. He stated
147 to me that his company was turning out a large quantity of oil, shipping largely of their production abroad, and that they required advances which were not obtainable from the banks upon their property. He further stated that they held a very valuable property —their works—and named $500,000 as either the cost or probable value of the property. That he had control of the company and owned all of the stock except a very small proportion held by parties who acted as trustees of the corporation. I have stated already that he came to me for the purpose of procuring advances; he wanted advances that could not be obtained from ordinary banking institutions, and asked that this company of mine, as he called it, should make him the advances required to the amount that he might probably want, which was named as $100,000. He proposed to get this money upon the property of the company. He spoke of borrowing money of the New York Guaranty and Indemnity Company on the property of this Kerosene Oil Company, and spoke of the value of the property, either the value or cost being $500,000, and therefore it was abundant security for $100,000, if the company would make the loan. He stated that he was virtually the owner of the company and that he could have the company make the mortgage.

Q. He proposed to secure the loan by mortgage on the property. What did he say, if anything, about the property of the company being unencumbered?

(Objected to as irrelevant and incompetent.)

A. He stated very positively that the property was unencumbered, and that he could give, and would give, the company a mortgage on this property, which I said before was valued at $500,000, to secure an advance of $100,000, or whatever advance might be made.

Q. Who was at that time the president of the New York Guaranty and Indemnity Company?

148 A. Joshua J. Henry, now deceased.

Q. Who was the vice-president of the company?

A. James P. Wallace, who is now president.

Q. What, if anything, did Mr. Cozzens say in reference to an introduction to the then officers of the company?

(Objected to as before.)

A. After hearing Mr. Cozzens's statement I told him that I would take him to the office of the company and introduce him to the officers; and that I had no doubt that some arrangement could be made to meet his views.

Q. Please state whether or not at the time you placed reliance upon and what reliance upon Mr. Cozzens's statement.

(Objected to as before.)

A. I had had a long acquaintance with Mr. Cozzens and supposed him to be perfectly reliable, and was aware of the fact that he had purchased the interest of other stockholders in this corporation some time before; and had no doubt myself that he was the virtual owner of the concern. (This part of answer objected to as irresponsive and incompetent.) I relied implicitly on Mr. Cozzens's statement.

Q. You did at the time, in fact, place implicit reliance upon Mr. Cozzens's statement?

(Objected to as irrelevant and incompetent.)

A. I did.

Q. To what extent was it a matter of general knowledge in the mercantile community that Mr. Cozzens was the sole manager of the business and affairs of the New York Kerosene Oil Company?

(Objected to as before.)

Q. How had you acquired knowledge as to the fact that Mr. Cozzens was the sole manager of the business and affairs of the Kerosene Oil Company?

(Objected to as before.)

A. I had heard it spoken of previously at various times. I had
149 heard Mr. Cozzens speak of it. I had heard Mr. Wm. H. Appleton speak of having had an interest in it, and having sold out his interest; and without being able to give the names of other parties, as the time is so remote, I had a distinct impression on my mind that Mr. Cozzens, when he made that statement to me, was making a true statement; a more distinct impression than I would have had if I had never heard of the Kerosene Oil Company before.

(Objected to as irresponsive and incompetent.)

Q. Did you introduce Mr. Cozzens to the officers of the company?

A. I did, sir.

Q. Immediately after this conversation?

A. We went directly from the office to the office of the company, and found the president and vice-president in that office.

Q. State what took place there as far as you have knowledge of it, from being personally present.

(Objected to as irrelevant and incompetent.)

A. It would virtually be a repetition of what passed in my own office.

Q. Did Mr. Cozzens then and there make application for advances on the security of a mortgage to be made on the real estate and works of the Kerosene Oil Company?

(Objected to as before.)

A. He did. It was a verbal application, and a repetition of the one made in my office.

Q. Did you leave him there with the officers?

A. I did, sir.

Q. How was it as to the subsequent details of the transaction; who had charge of this, yourself or the officers?

A. Those were carried out by the officers of the company.

Q. State whether or not the application was made to the officers of the company, and the representations which had been made to
150 you were also made by Mr. Cozzens to those officers, and in your presence.

(Objected to as before.)

A. They were; the statement was repeated. In other words, they had been made before.

Cross-examination by Mr. CHOATE:

Q. Mr. Babcock, how long have you known Mr. Cozzens as a business man?

A. More than 20 years.

Q. Was any person present at the interview to which you have referred in your own office?

A. No, sir; it was in my private office. Parties may have come in, but there was no one sat in the same room with me but him.

Q. So far as you know there was nobody there that heard the conversation at all?

A. No, sir.

Q. Had the Guaranty and Indemnity Company had any previous transactions with Mr. Cozzens?

A. None that I am aware of.

JAMES P. WALLACE was next called as a witness on behalf of the defendant, and, being duly sworn, was examined by Mr. BUTLER and testified as follows:

Q. Mr. Wallace, you reside in the city of Brooklyn?

A. Yes, sir.

Q. Have been a merchant in this city for many years?

A. Over thirty years.

Q And are now president of the New York Guaranty and Indemnity Company, the defendant in this action?

A. Yes, sir.

Q. How long have you been president?

A. About four years.

Q. Previous to that time wer you vice-president of the company?

A. I was vice-president for about three years.

Q. From the time of its organization?

151 A. Yes, sir; or from the time it commenced business, in 1865.

Q. In 1867, what business was that company carrying on under its charter?

A. Making advances on securities.

Q. Did you know at that time and previously of the New York Kerosene Oil Company?

A. I had heard of it; was not personally acquainted with it.

Q. How long before had you had knowledge of the existence of that company?

A. Well, I think from either 1860 or 1861.

Q. Please state whether your knowledge of it was derived from mere hearsay or from actual connection with any transaction relating to the company, the Kerosene Oil Company?

A. My first knowledge of it grew out of the fact that I was on a jury where the Kerosene Oil Company was defendant in a case of damages being claimed for loss of life by a boiler explosion.

Q. In February, 1867, did the New York Guaranty and Indemnity Company have any transaction with the Kerosene Oil Company?

A. Yes, sir.

Q. Where was it?

A. At the office of the New York Guaranty and Indemnity Company, 14 Broad street, in the city of New York.

Q. State the date, if you recollect it.

A. The 15th of February, 1867.

Q. What application, if any, was made to your company then and there on behalf of the Kerosene Oil Company? And state all that occurred.

(Objected to as irrelevant and incompetent.)

A. Abraham M. Cozzens was introduced to Mr. Henry and myself by Mr. Babcock, and stated that he desired to borrow some money for the New York Kerosene Oil Company, to be secured by a mortgage on its real estate on Newtown Creek. We asked Mr. Cozzens various
152 questions in regard to the property and in regard to his right to mortgage it. He stated that he was president of the company, that he owned nearly all the stock of the company, that he had the entire management of it, and that he had a perfect right to promise to execute a mortgage. He stated that the real estate of the company was worth about $500,000 and was free of any incumbrance. He wanted $100,000. He wanted it to be used in the prosecution of the business of the Kerosene Oil Company; that he stated. He said the business of the company was very large and required a large amount of money. I said to Mr. Cozzens that we would like to have a statement in writing covering the substance of what he stated in the conversation. He sat down at my desk and wrote a letter addressed to the president of the New York Guaranty and Indemnity Company.

Q. The paper I now produce, marked Exhibit I, for identification, January 22, 1873—state whether or not that is the paper he then wrote.

A. Yes, sir.

The paper was read in evidence (and was objected to as irrelevant and incompetent), and is as follows:

[New York Guaranty and Indemnity Company, office No. 14 Broad street.]

FEBRUARY 15, 1867.

The New York Guaranty and I. Co., J. J. Henry, esq., president:

DEAR SIR: It is understood that we will cause to be prepared a mortgage on the real estate of the company on Newtown Creek, for the sum of $100,000, in your favor, and to be held by you for the loan of $50,000 made this day, and any future loan you may make to our company.

Your obedient servant,

A. M. COZZENS,
President of the N. Y. Kerosene Oil Co.

Q. This letter appears to have been written on one of the letter
153 sheets of your company. The words "New York Guaranty and Indemnity Company, offices No. 14 Broad street," being in print; is it the fact that it was so written?

A. Yes, sir.

Q. And written in your office at the time of the first interview in respect to which you have testified?

A. Yes, sir; written at my desk, and I was standing by when he wrote it.

Q. State what then occurred.

(Same objection as before.)

A. After writing this letter Mr. Cozzens produced a note of the New York Kerosene Oil Company, endorsed by Cozzens & Company.

Defendant's counsel here called on complainant's counsel for the production of the note referred to by witness. Plaintiff's counsel produced a paper which he states was found among the papers of the firm of Cozzens & Company in the hands and possession of Mr. Todd, assignee in bankruptcy of Thomas M. Cozzens, the surviving partner of the firm.

It was then read, and is as follows:

$50,000] NEW YORK, *Feb'y 15th*, 1867.

Sixty days after date we promise to pay, to the order of Cozzens & Co., fifty thousand dollars at .

Value received.

No. ; due .

A. M. COZZENS,
President of New York
(rest of signature torn off.)

(Endorsed:) Cozzens & Co. Waiving demand and notice of protest. Cozzens and (rest of signature torn off.)

Q. (Note shown witness.) Is that the note, Mr. Wallace?

154 A. This note corresponds in date and amount with the books of the New York Guaranty and Indemnity Company, and with my memorandum. I do not find on it any marks made in the office of the New York Guaranty and Indemnity Company in any handwriting recognizable by me to identify it absolutely, but it corresponds in all those respects.

(Complainant's counsel further stated that search had been made among the papers of Cozzens & Company and no similar paper was found.)

Q. You have no doubt that it is the note?

A. I presume it is the note.

Q. The bottom right hand corner of that note has been torn off, leaving below the signature "A. M. Cozzens" the words "President, New York." What followed that?

A. Well, according to the entry on the books of the Guaranty and Indemnity Company, and according to my memorandum, what followed would be "Kerosene Oil Company," or it might have been the initials; but we have the full name on our books.

Q. Then your present recollection of the note which Mr. Cozzens produced was a note signed "A. M. Cozzens, President Kerosene Oil Company"?

(Objected to.)

A. My recollection is that he produced a note made by A. M. Cozzens, president of the New York Kerosene Oil Company.

Q. You were going on with your consecutive narative; you stated that before signing this paper he produced this note; now just say whatever he said about this.

(Objected to as before.)

A. He desired us to discount that note, and that he would have the mortgage prepared as soon as possible, which should secure that amount.

Q. Did he make any statement in reference to that note—what that note represented?

(Objected to as before.)

A. Yes, sir; he stated that the Kerosene Oil Company owed

155 his firm over $100,000, and that this note represented a part of that amount, and gave that as his reason for promising the mortgage.

Q. Was any time fixed within which he was to deliver the mortgage to you, or how soon?

(Objected to as before.)

A. As soon as it could be executed.

Q. How was it, Mr. Wallace, as to your belief at the time of the truth of the statements made by Mr. Cozzens?

(Objected to as before.)

A. We relied upon those statements, and upon his promise to execute the mortgage. We should not have paid any money or advanced any money on that note except with the promise of the mortgage. We relied upon his representation as to his ownership of the stock.

Q. The mortgage to be made was to secure not only the $50,000 then advanced, but future advances up to $100,000?

(Objected to as before.)

A. That was the promise at that time; his verbal promise to that effect.

Q. But that sum of $100,000 was the sum mentioned at the time as the proposed limit for advances?

A. Yes, sir.

Q. State whether or not anything was said at the time in reference to the form of the mortgage or anything in reference to the mortgage except what you have already stated and what is contained in writing.

(Objected to as before.)

A. I do not remember further than that the mortgage was to cover the property on Newtown Creek, the real estate of the company, valued at $500,000. It was to be executed to the New York Guaranty and Indemnity Company, and was to secure the advance of $50,000 we were then negotiating for, and $50,000 more which he desired us to give him after the mortgage was executed.

156 Q. Did you on that day advance the sum of $50,000 (15th of February)?

A. Yes, sir.

Q. Upon what was that advance made?

(Objected to as incompetent, and also as to form.)

A. Upon the note of the Kerosene Oil Company and the mortgage to be made.

Q. At that time state whether or not anything was said about any bond of Cozzens being given.

(Same objection.)

A. I do not think the form of the mortgage or the bond was spoken of.

Q. Well, was anything said in reference to his giving his own bond, to your recollection?

A. No, sir.

Q. When did you first see, or know, or hear of Mr. Cozzens' bond being given?

(Same objection.)

A. When the mortgage and the bond were delivered. It was a matter of surprise to me that Cozzens' bond accompanied it.

(Objection to last part of answer.)

Q. Do you know by whom the mortgage and the accompanying bond were prepared?

(Objected to as irrelevant and incompetent.)

A. I do not, except as I was told at the time. Mr. Cozzens told me at the time he delivered the bond and mortgage to us that they were prepared by his own counsel.

(Objected to.)

Q. Do you know the fact that they had not been prepared by the attorneys or counsel of the New York Guaranty and Indemnity Company?

(Objected to.)

A. Yes, sir; I knew that fact at the time.

Q. When did Mr. Cozzens bring in the mortgage and accompanying bond?

A. I think it was in March, but I do not remember, having no data to establish the date.

157 Q. Between the date of the first advance and the bringing in by him of the mortgage, had you had any intercourse or communication with him in this matter?

A. Not that I remember.

Q. Then the next step in the transaction was his bringing a mortgage to your office and delivering it there, and stating at the time that it had been prepared by his own counsel?

(Objected to.)

A. Yes, sir.

Q. Look at these papers and see if they are the mortgage and the bond by brought to Mr. Cozzens. (Handing papers to witness.)

A. Yes, sir.

(They were read in evidence and marked Def'ts' Exhibits A and B, Feb'y 4, 1873, W. H. P.)

Q. What action, if any, did you take in reference to these papers; what did you do with them?

A. I delivered them to the counsel of the Guaranty and Indemnity Company, Mr. Butler, with a request that he would examine them, and also that he would search the title of the property.

Q. How soon after you received the papers from Mr. Cozzens did you deliver them to the counsel of your company?

A. I am not sure whether it was the same day, but it was very soon after I received them; perhaps not the same day, but very soon after.

Q. State whether or not you knew at the time, and thereafter, of the pending examination of the title by your counsel?

A. I knew that Mr. Butler said that they were making an examination of the title.

Q. Were any papers delivered except the mortgage and bond?

A. I do not remember of any others being delivered to me.

158 Q. Were you apprised of the fact that other papers were required by your counsel—by the counsel of the company?

(Objected to.)

A. I was so informed by the counsel of our company, that something more was required to perfect the mortgage.

Q. As a security?

A. Yes, sir.

Q. You know the fact, Mr. Wallace, and did know it at the time, that the mortgage was in the hands of the counsel of your company for the purpose of seeing that it was perfected as a valid security, as well as for the purpose of examining the title to the real estate covered by the mortgage?

(Objected to.)

A. Yes, sir.

Q. And you knew the further fact, that your counsel required certain things to be done, or the evidence that they had been done furnished by the Kerosene Oil Company?

(Same objection.)

A. Yes, sir.

Q. The mortgage shown you (Ex. A) appears to have been originally acknowledged on the 9th of March, 1867, as originally brought to you; do you recollect whether that was the date of the certificate of acknowledgment 9th of March, 1867?

A. Yes; I know the fact, that the mortgage, as brought in by Mr. Cozzens, had upon it the certificate of acknowledgment commencing, "On this 9th day of March, in the year 1877?" That date appears to have been erased, and the 7th day of May written over the erasure.

Q. Do you recollect the date of the mortgage when it was first brought in to you?

A. The date of the mortgage, and commencement of it, appears to have been written over an erasure.

159 Q. Can you state whether or not the date in the mortgage, as originally brought to you, corresponded with the date mentioned in the certificate of acknowledgment, the 9th day of March?

A. I have no doubt it did, because I read it carefully through before I delivered it to the counsel, and did not notice any discrepancy.

Q. And the words at the foot of page 1 of the mortgage, "And the consent of stockholders of said party of the first part to the making of this mortgage having been first duly given and filed, pursuant to law, and recorded herewith." Do you recollect whether or not those words were in the mortgage when it was first brought in?

A. They were not in it.

Q. Then, after the mortgage passed into the hands of the counsel of your company, the recital referred to in the last question was introduced. The date of the mortgage was altered to the 29th day of April 1867, and, as appears by the certificate and acknowledgment, it was acknowledged on the 7th day of May, 1869?

A. Yes, sir.

Q. That is the fact. The date of the bond appears to have been altered? You have no doubt that the date of the bond, as originally brought in, corresponded with the date of the mortgage?

A. I am sure that it did.

Q. Mr. Wallace, do you know the fact, that between the 9th of March and the 11th of May, 1867, the mortgage in the hands of your counsel was the subject of action on their part with the Kerosene Oil Company and its counsel, in reference to the papers which your counsel considered necessary in order to perfect the mortgage as a security?

(Objected to.)

A. Yes, sir.

Q. Mr. Wallace, state what, if anything, was done between your company and the New York Kerosene Oil Company on the 11th day of May, 1867, in reference to this transaction?

160 (Objected to.)

A. On the 11th of May, 1867, after the mortgage and the bond had been returned to us by our counsel, and approved [objected to], Mr. Cozzens came to our office, and we made a full settlement of the old account. We ascertained the amount that he owed us on that day, which, with the accumulation of interest, exceeded $50,000 a little. He paid us the difference, and the $50,000 was renewed on the 11th of May,

1867, and endorsed upon the bond, and the endorsement signed A. M. Cozzens.

Q. State what was said at the time in reference to the making of the settlement up to that date, or what was done.

(Objected to.)

A. It was done to make the advances to Cozzens, all of them, correspond in date with the mortgage and the bond as they had been re-acknowledged.

Q. State whether or not it was in reference to the mortgage as it had been perfected by your counsel.

(Objected to.)

A. It was.

Q. State to what extent the advance made on the 11th of May, 1866, the previous advances, were made by your company on the faith of the mortgage.

(Objected to.)

A. They would not have been made except for the promise of the mortgage. They would not have been renewed on the 11th of May, except for the presence of the mortgage and its approval by the counsel of our company.

Q. State whether or not the new note taken by you on the 11th of May was the note of the Kerosene Oil Company.

A. It was. It is so certified here on the bond.

Q. State to what extent and in what manner, in the making of
161 the subsequent advances, the possession of the mortgage as a continuing security was relied upon by you.

(Objected to.)

A. It formed the basis of the second advance, and was relied upon as security for the second advance.

Q. That second advance was how much?

A. $25,000, made on the 18th of May, 1867, by the note of the New York Kerosene Oil Company.

Q. And the third?

A. The third advance was on the 22d of June, 1867, on oil represented by a warehouse receipt of the New York Kerosene Oil Company, which oil was represented to be ——. We relied upon the mortgage because the oil was in their possession, and while we regarded it to some extent as collateral, we regarded the mortgage as our main reliance.

Q. The warehouse receipt you refer to was simply the receipt of the Kerosene Oil Company itself, was it not?

A. Yes, sir.

Q. Is this the paper? (Handing paper to him.)

A. Yes, sir; this is the receipt.

(Paper read in evidence and marked Defendant's Exhibit C, Feb. 4, 1873, W. H. P., and invoice accompanying, marked Defendant's Exhibit D, Feb. 4, 1873, W. H. P., for identification.)

Q. There never was any pledge or transfer of the oil mentioned in that receipt in fact, was there, except the delivery of that paper to you?

A. No, sir; and the showing of the oil to a man that we sent up there to see it.

Q. The oil was in tanks at the works of the Kerosene Oil Company?

A So represented.

Q. So represented by whom?

A. A. M. Cozzens and the man that we sent up to see it.

162 Q. You never received any of the oil or any proceeds of sale of any of the oil?

A. No, sir.

Q. Please state how that warehouse receipt and invoice came into your possession, and at what time.

A. It was delivered to us on the 22d of June, 1867, by A. M. Cozzens, president.

Q. Now state what occurred at the time of that delivery; how it came about that he gave you those papers.

(Objected to.)

A. He wanted $25,000 in money, and represented that it was to pay for a large amount of oil that he had just put into those tanks, and that he would secure it in addition to the mortgage by the warehouse receipt for the oil.

Q. You took the warehouse receipt as an additional security to the mortgage?

A. Yes, sir.

Q. And it turned out to be of no value whatever, did it not?

A. We made a demand for oil on it after the failure, and failed to obtain it. We were notified that it was all gone.

Q. Mr. Wallace, when did you first hear of any embarrassment in the Kerosene Oil Company? State it in reference to the time of their failure.

A. (Referring to the memoranda.) Won't you allow me to refer to the memoranda I have here, which will probably enable me to give the dates more definitely? I think it was after the first of January, 1868, or in January, 1868.

Q. At the time of the failure of the company?

A. Yes, sir.

Q. There were renewals of the original notes as they matured?

A. Yes, sir.

Q. And upon the renewals the original notes were given up?

163 A. Yes, sir.

Q. Can you identify the notes representing the advances, held by you at the time of the failure (handing papers to witness)?

A. Yes, sir; I recognize this one for $50,000, dated 13th July, 1867, made payable 60 days after date; when it became due, instead of executing a new note, the demand and protest was waived and the advance continued, retaining this same note.

Q. There was no note for the last advance?

A. No, sir; the last advance was predicated on the oil; but its receipt is endorsed on the bond.

Q. At the time of the failure of the Kerosene Oil Company the indebtedness to your company then stood at $100,000, the aggregate of these advances and renewals thereof?

A. Yes; and some interest besides.

Q. That was the principal of their debt to you, as claimed by the New York Guaranty and Indemnity Company?

A. Yes, sir.

Q. You have received no payment on account of this in any way, Mr. Wallace, for your company?

A. No, sir.

Q. The whole amount is now due with interest?

A. Yes, sir.

Defendant's counsel here put in evidence the endorsements on the bond as well as the bond. They were read in evidence.

The two notes above referred to were also put in evidence by defendant's counsel. They are dated respectively 20th June, 1867, and 13th

July, 1867, and were marked Defendant's Exs. E and F, respectively, February 4th, 1873, W. H. P.

Adjourned to Wednesday, February 5th, 1873, at 11 o'clock a. m.

164 Hearing resumed February 5, '73.

Direct examination of James P. Wallace continued:

Q. Were there any other papers or writings connected with the transactions in regard to which you have testified?

A. Yes, sir; there was an agreement regulating the amount of commission and interest.

Q. You have referred to the customary agreement that your company takes in regard to advances?

A. Yes, sir.

Q. Please look at the papers now shown you, and state if they are the agreements referred to, and state the times and order in which they were given.

A. This is the usual form adopted by our company in making all of its advances, whatever the collateral security may be. The one that I now have is for $50,000, dated January 11th, 1868, which is the last renewal of the advance of $50,000, which is endorsed on the bond.

Q. Which is the last renewal of the first advance?

A. Yes, sir.

The paper was read in evidence, marked Def't's Ex. G., Feb. 5, '73, W. H. P.

Q. Go on with the other.

A. The next one is dated 22d August, 1867, for $25,000, and has on it this endorsement: "This advance is a continuation of that made 18th May, 1867, which was renewed this date on the 20th of June, 1867." It is a continuation of the second endorsement on the bond, being the second advance; this one is marked cancelled.

(The paper was read in evidence and marked Def't's Ex. H, Feb. 5, '73.)

There is another relating to the said advances, dated 20th December, 1867, for $25,000, and this is the last renewal of that second advance; this agreement bears the endorsement, "This advance is a continuation of that made 18th of May, 1867."

165 (Paper was read in evidence, and marked Def't's Ex. I, Feb. 5, '73, W. H. P.)

This one, dated 18th of December, 1867, for $25,000, is the last renewal of the third advance; this bears the endorsement as follows: "This advance is a continuation of that of 22d of June, 1867."

(Paper read in evidence and marked Def't's Ex. K, Feb. 5, '73, H. H. P.)

Q. (By Mr. CHOATE.) That is the one on the oil?

A. It is the one on the oil; 10,000 barrels of oil.

Q. (By Mr. BUTLER.) State whether or not those several agreements or the sums of money mentioned therein relate to the same or any other loan or loans than those mentioned in the paper dated February 15th, 1867, signed by Mr. Cozzens, as president of the New York Kerosene Oil Company, and written on that day in the office of your company.

(The question was objected to as assuming that specific loans are mentioned.)

A. They relate to the loans specified in this paper, and to no other loans.

Q. State whether or not all the transactions between your company

and Mr. Cozzens, referred to in your examination, had reference to the loans specified and referred to in that paper of February 15th, 1867.

(Objected to.)

A. They did.

Q. And whenever they were in the form of renewals they were renewals of original loans predicated upon that paper?

A. Yes, sir.

Q. In your answer to one question yesterday, I noticed that you stated that on the 11th of May, when the settlement was made, you calculated the amount he owed you up to that time; did you or not mean that Mr. Cozzens owed your company any debt at that time?

166 A. I mean that I calculated the amount due us on the advances to the Kerosene Oil Company through Mr. Cozzens as president.

Q. You stated that Mr. Cozzens represented to you on the 15th of February, 1867, that the New York Kerosene Oil Company owed his firm of Cozzens & Company at that time more than $100,000; state whether or not at any time since that date you have known or heard anything to contradict or impeach the truth of that statement?

(Objected to.)

A. I never have.

Q. Up to this date?

A. No, sir.

Q. Have you made any personal examination of the books of Cozzens & Company, and of the New York Kerosene Oil Company, which have been produced by the complainant in the course of this hearing?

A. Yes, sir; I examined them in court pretty thoroughly.

Q. And after the hearing had been concluded, on different days, have you not?

A. Yes, sir.

Q. Of the oil company and of Cozzens & Company; haven't you made personal examination of the account between the New York Kerosene Oil Company and Cozzens & Company, appearing in those books?

A. Yes, sir.

Q. State generally what has been the result of that examination, in reference to the existing indebtedness appearing on those books, at the time of your first advance and subsequently.

A. I cannot give you the figures from memory, but I can say from memory that there was a large balance at the end of every month, beginning with February, 1867, and continuing on through to the 1st of January, 1868; that there was a large balance at the end of every month due to Cozzens & Company, and I think, with one exception, that

167 it exceeded every time $100,000. In one or two instances, very largely exceeded it.

Q. Did that apply to the end of January, 1867?

A. I think that my examination extended through the whole of 1867.

Q. Beginning with the first of January?

A. From January, 1867, to the failure.

Q. When did you first have any knowledge of the way in which the business was managed by Cozzens & Company, or of the manner in which the accounts between the Kerosene Oil Company and Cozzens & Company were kept?

A. My first knowledge of the manner of keeping the accounts was after I saw the books in court; my first knowledge of the general manner of keeping them, without seeing the inside of the books, was after the failure, immediately after the failure; I had Mr. Cozzens' statement at the time of making these advances.

Q. Previous to your connection with the New York Guaranty and Indemnity Company, were you a commission merchant, Mr. Wallace?

A. I was, for about 25 years.

Q. In this city?

A. In this city.

Q. Acquainted with the commission business?

A. I did a large commission business most of that time, and a successful one.

Q. You heard the evidence of Mr. Fowler, given yesterday, in reference to the shipments of oil, and the commissions charged on the same by Cozzens & Company; state from your experience as a commission merchant, whether or not those commissions, as stated to have been charged by Mr. Fowler, were correctly charged.

(Objected to as incompetent and irrelevant.)

A. That would depend upon a contract which has not been produced.

168 Q. In the absence of contract, speaking from usage and custom of commission merchants in the city of New York, what would you say?

(Objected to.)

A. It is customary with commission merchants to charge a guaranty commission in all cases, and that guaranty refers to the responsibility of the parties to whom goods are sold, guaranteeing against selling to weak and irresponsible houses.

Q. In the case of consignments to foreign consignees, would the commission be affected by the result of the transaction, whether a profit or loss?

(Objected to.)

A. I should think not; the commission on a guaranty is for doing the business, and certifying the responsibilities of the parties that the property is shipped to; the profit or loss depends upon the rise or fall of a market, subject to which it is shipped.

Cross-examination by Mr. CHOATE:

Q. These four contracts which you have produced to-day, and which are marked Exhibits G, H, I, and K, are they all the papers of this character connected with those loans which you have in your possession, or which are in the possession of the company?

A. So far as I know they are all I know of that are left in the possession of the company. I think some of previous dates to these were surrendered up to Mr. Cozzens.

Q. There are two here relating to one of the $25,000 loans, and one relating to each of the other two?

A. Yes, sir.

Q. Was there given with those loaned at the time of this advance of $25,000 to which Ex. H relates, at the time of the original advance, a similar contract

169 A. I have no doubt there was, as we make these kind of contracts in all of our dealings; it is our universal rule.

Q. And of course it was substantially the same form as this?

A. I have no doubt it was.

Q. And signed by Mr. Cozzens; and is that true of Ex. G?

A. I think it is true of all of them.

Q. And upon the renewal of the loan referred to in this Ex. G., as well as at the time of the original advance, a similar contract was given, executed by Mr. Cozzens?

A. I have no doubt such a one was given.

(Complainant's counsel said he had looked among the papers of Cozzens & Company and found no contracts such as are before testified to.)

Q. Do you know how it was that this cancelled one was left with you?

A. We usually give them upon the renewal, sometimes, through inadvertence, not being asked for, or our treasurer having it left on his desk, he drops it into the envelope with the renewal.

Q. The difference in the rate of the commission in Ex. G, I suppose, is owing to the fact that the loan was for a longer time, or that the new note taken was for a longer time. You notice that one is ¾ per cent. and the other is 1½ per cent.?

A. Yes, sir; that is for 60 days, at 1½ per cent., the other is 30 days, or ¾ per cent.

Q. And that commission is for the custody and care of the property confided to you, is it not?

A. Yes, sir.

Q. And this commission of 1½ per cent. or ¾ per cent., as it may be, is a commission for the period for which the note is given, that is 30 or 60 days?

A. Yes, sir.

Q. And is regulated by the time the note has to run?

A. Yes, sir.

170 Q. Do you recollect whether the interest and commission were deducted at the time of the advance of the $50,000; I mean whether they were deducted at the time of the advance, or whether they were taken out when they came due?

A. My impression is that the commission was deducted, and that the interest remained until its maturity.

Q. The commission was at the same rate on each of these renewals, for 60 days 1½ per cent.?

A. So far as these papers appear.

Q. Well, wasn't it so on the earlier papers?

A. I have not examined to see that; I presume it was.

Q. Look at this paper now shown you, and state if that is the paper that came from your company?

A. It appears to be.

Q. Isn't that a computation made in that office?

A. It appears to be.

Q. And isn't that the computation of which you have spoken, as the difference which Mr. Cozzens paid upon giving that new note and the taking up of the old one on the 11th of May, 1867?

A. I think it is.

Q. It appears by the stamp that that was paid or settled on the 14th of May, does it not?

A. Yes, sir.

Q. Then, I suppose, from that paper that the actual payment was probably made on the 14th instead of the 11th; it is computed to the 11th.

A. I should think that it was made up on the 11th, and perhaps that Mr. Cozzens' check for the amount did not come in until the 14th, at which time that stamp was put on.

The paper is as follows:

Charges on adv. due 16th April			$50,000
25 days' int	$243 06		
Coms. pro rata	312 50		
			555 56
171 Charge on adv. May 11:			
63 days' int	612 50		
1½ per cent. com	750 00		
			$1,362 50
			1,918 06
			25 00
			$1,943 06

MAY 11, 1867.

Q. What is the $25 for, making up the total $1,943.06; is that the stamp?

A. I should think it likely it was for the stamp, but it don't say so, but there would be a $25 stamp on that note.

Q. Look at the paper which has been produced by complainant's counsel, and in regard to which you have stated you presumed it is the original note for $50,000, signed by A. M. Cozzens, president of the New York Kerosene Oil Company, and state whether that ever had a stamp on it.

A. There is no stamp on it now; my opinion is that it had one when we took it, and that we wouldn't have taken it without a stamp.

Q. You have no recollection on that point?

A. Except the general one, that we always required stamps.

Q. But as a matter of recollection you don't remember anything about stamps being on it?

A. No, sir.

Q. Isn't it a matter of surprise to you, on seeing that paper, that there are no marks on it showing that it had ever been in the possession of your company?

A. No, sir; I don't know that it is.

Q. Wouldn't you expect to see something on a note that had been in your possession, by which you could identify it by something peculiar, by which you would know it was a paper that had been in the possession of your company?

172 A. There was no special occasion to do so; it didn't go on a file, but was put in an envelope with the agreement, and then retained.

Q. The only custody or charge of the oil referred to in Ex. K, which your company ever had, was the possession of the receipt, which you have also produced; was it not?

A. We sent a man up there to examine it.

Q. At the time you took the receipt, you sent a man up there?

A. After taking the receipt.

Q. How long after was that?

A. We sometimes have an endorsement on the receipt of the date. Have you got that receipt? (Paper handed to witness.) There is no

such endorsement on this receipt. I think, though, it was within a very few days after.

Q. Well, with that exception, and the possession of that receipt, did your company have any custody or charge of the oil mentioned in Ex. H?

A. Unless it was holding policies of insurance upon it, and that I can't speak positively of without reference to the books.

Q. You are not sure that you did hold any policies for it?

A. We usually do.

Q. You are not sure as to this?

A. I have not examined the books to see; I have not had my attention called to it before; I have no recollection about it at present.

Q. You stated in your direct examination, Mr. Wallace, that between the 9th of March and the 11th of May, 1867, this mortgage was in the hands of the counsel of your company, and that during that time it was the subject of action between your counsel and the counsel of the Kerosene Oil Company; do you remember making that statement?

A. Yes, sir.

173 Q. Now, how do you know that it was the subject of action; I mean what were your means of knowledge?

A. Well, I think I must have obtained my information from our counsel.

Q. And otherwise than as you obtained information from your counsel, you have no knowledge of the fact of such action so far as you now recollect?

A. Well, I don't remember now of obtaining the information in any other way than through our counsel.

Q. Mr. Wallace, do you remember whether in any instance of the renewal of any of these loans checks were exchanged, the check of your company for the check of Cozzens & Company?

A. I don't find any, or haven't seen any record of any such exchange.

Q. You don't remember any?

A. No, sir; it is not our practice to require an exchange of checks.

Q. Was any other person present except yourself, and Mr. Babcock, and Mr. Henry, and Mr. Cozzens at the first interview that you have spoken of at your office?

A. I think not.

Q. Where a commission merchant charges what is called a guaranty commission the charge consists of two elements, does it not; part of it is for doing the business and a part is for guaranteeing the payment or solvency of the vendee?

A. Yes, sir.

Q. Now, as a general rule, is not the commission for a commission merchant to be footed upon the sale price obtained?

A. Yes, sir.

Q. Now suppose, Mr. Wallace, you were a commission merchant, acting for a principal, where you shipped goods for sale abroad, would you charge any commission until they were sold abroad?

A. I have done it both ways.

174 Q. Well, is there any usage about it, any general custom among commission merchants; I am limiting you now to a shipment for account of your principal?

A. I think the usage is both ways.

Q. Suppose the case of a shipment for account of your principal on which advances are to be made, but that transaction is confessedly a shipment for sale abroad on his account; now, except for the purpose which you have stated, there being an occasion for an account being

rendered between you and your principal, would you, as a commission merchant, charge a commission on the advance received on those goods, or on the shipment?

A. In the cases that come within my memory we rendered our accounts monthly, and when the property was not sold we charged a commission on the amount of advances, and then after the property was sold made another charge for a commission on the difference between the advance and the sale, if the sale exceeded the advance.

Q. So that the ultimate amount of the commissions depends upon the sale abroad; and if the amount received for the goods exceed the advances, then there would be an additional sum charged for commissions, would there not?

A. I think that was the way I did mine.

Q. And in case of the depreciation of the goods from a fall of the market the sale abroad should result in less than the advances, then there would be a rebate or reduction of the commissions credited back to the principal?

A. No, sir. I think my memory in those matters is that we never credited back any commissions; having made an advance for a certain amount we considered ourselves entitled to a commission upon that advance.

Q. Then your experience of the usage of merchants is that if the ultimate price got for the goods exceeded the advance, you made an
175 addition to the commissions paid; if it was less than the advances you made no allowance on the matter of commission to your principal?

A. So far as my memory now reaches that point, I think that that is the case.

Q. And you were very successful, as you stated, in your business as a commission merchant?

A. Always have been.

Q. Mr. Wallace, in answer to the last few questions on your cross-examination, when you made that explanation of the advances, you have referred to advances made by you as between you and your principal on goods shipped abroad?

A. Yes, sir.

Q. Have not referred to advances made upon the goods by other parties, and received by you upon the security of the shipment?

A. It would be likely to be the same amount.

Q. But the advances that you have referred to were where you had made advances yourself?

A. That was what I had in my mind.

Q. Now, suppose upon a shipment made for account of your principal, another party advances to you a certain amount of money, which you credit to your principal on that advance; as I understand you, you would charge a commission?

A. Yes, sir; because we negotiate the sale, we draw the bills for it, and take the responsibility.

Q. Would the commission in that case be regarded by you as a compensation for doing that business, and assuming that responsibility?

A. Well, we always separated that; a commission for doing the business and a guaranty commission. The guaranty commission was charged in some cases and not in others, according to the contract which we had with the parties.

Q. Then the guaranty commission was not charged on the advance made?

A. Yes, sir.

176 Q. And in your business you separated the two; had a separate guaranty commission, separate from the commission on the advances for doing the business?

A. Yes, sir.

Q. This commission for guaranteeing, as you understand it, is exclusively for guaranteeing the solvency of the vendee; it is a guaranty for the actual payment of the goods?

A. Yes, sir.

Q. Now suppose advances are made at the time of the shipment for the value of the goods up to the whole amount or price that you would finally get for the goods, what is there to guaranty?

A. Those advances are usually made by time drafts; we draw our bills of exchange for 60 days on London or elsewhere, and we run the risk, and we have to guaranty their payment.

Q. Suppose there are no drafts drawn on such a transaction, and there are advances made in cash up to the value of the goods, what is there to guarantee under such circumstances?

A. I do not think I have ever shipped any goods except where we have drawn for the advances, and I do not remember any case except where we have always drawn on time; the customary business between here and European markets is 60 days.

Redirect:

Q. Mr. Wallace, you have no knowledge or means of knowledge as to the actual arrangement between the New York Kerosene Oil Company and Cozzens & Co. in respect to the commissions to be charged?

A. No, sir; I never knew anything about that till it came up in court.

Q. And with the exception of the evidence of Mr. Fowler yesterday, in respect to these commissions on shipments, you have never heard any criticism in reference to the accounts or the manner in which they were kept and in reference to the charges made by Cozzens & Co., in respect to the Kerosene Oil Co.?

(Objected to.)

177 A. I never heard their propriety questioned.

It was admitted on part of complainant that Thomas L. Ogden was, on the 9th of March, 1867, and also on the 7th of May, 1867, a notary public in and for the city and county of New York, and that if examined as a witness, would testify that on the 9th of March, 1867, Abraham M. Cozzens and George W. Austin appeared before him and made oath to the matters stated in the certificate of acknowledgment annexed to the mortgage, marked Def't's Exhibit A, and also that on the 7th day of May, 1867, said Abraham M. Cozzens and George W. Austin, personally came before said notary and again made oath to the several matters set forth in said certificate, and that at each of the times above mentioned said Cozzens and Austin were personally known to said notary.

This evidence was taken under the objection of complainant's counsel, to its competency and relevancy, with like effect as if the witness were present and testified as aforesaid.

Defendant's counsel then read in evidence the annual report of the New York Kerosene Oil Company, dated January 23, 1867, and duly filed and published according to law, with the verification annexed, which was read in evidence, and is as follows:

The New York Kerosene Oil Company, a corporation duly created and

organized under an act of the legislature of the State of New York, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, and the acts amendatory thereof, doth hereby, in pursuance of the requirements of said acts, report and state that the amount of the capital of said company is five hundred thousand dollars, and the full amount thereof has been paid in; that such capital consists of twenty-five
178 thousand dollars in cash which has been actually paid in cash, and four hundred and seventy-five thousand dollars for which full stock has been issued for certain property of that value, necessary for the business of said company, purchased by the trustees, and which has been conveyed and transferred to the said company and the said stock therefor thereby paid in; and the said company doth further report and state that the amount of its existing debt is two hundred and six thousand three hundred and twenty-eight dollars and fifty cents.

In witness whereof we, Abraham M. Cozzens, the president, Eli Kelly, Frank H. Cozzens, Charles L. Wheeler, and George W. Austin, a majority of the trustees of said New York Kerosene Oil Company, have hereunto subscribed our names the twenty-third day of January, one thousand eight hundred and sixty-seven.

ABRAHAM M. COZZENS,
President and Trustee.
ELI KELLY,
CHAS. L. WHEELER,
FRANK H. COZZENS,
GEORGE W. AUSTIN.
Trustees.

STATE OF NEW YORK,
City and County of New York, ss:

George W. Austin, being duly sworn, deposeth and saith that he is the secretary of the New York Kerosene Oil Company, in the foregoing report mentioned, and that the statements contained in said report are true, and further saith not.

GEORGE W. AUSTIN,
Secretary.

Sworn and subscribed before me this 23d day of January, 1867.
FREDERICK BULL,
Notary Public, 58 Wall Street.

(Complainant's counsel objected to the paper as incompetent and irrelevant.)

Defendant's counsel then put in evidence extracts from the book of minutes of the New York Kerosene Oil Company, by which it appeared that at an annual meeting of the stockholders of the New York Ker-
179 osene Oil Company, held New York, July 21, 1864, Abraham M. Cozzens, James E. Kelly, Eli Kelly, F. M. Cozzens, C. L. Wheeler, and George W. Austin, were elected trustees for the ensuing year; and that at a meeting of the trustees of the New York Kerosene Oil Company, held on the same day, A. M. Cozzens was elected president, and G. W. Austin was elected secretary and treasurer.

That at the annual meeting held August 4, 1865, the same above-named trustees were elected trustees.

That the book of minutes contains no further entries of any meeting

of stockholders or trustees until March 8, 1867, when the following entry appears:

(It is the same already put in evidence by the complainant.)

And that the proceedings of the meeting of trustees on the 9th of March, 1867, on page 35 of the book of minutes, immediately follows the record of proceedings on the 8th March, 1867, the said record of March 9th, 1867, having already been put in evidence by complainant's counsel; and that the book of minutes contains no other entry of any further meeting or transaction until the minutes of a meeting of stockholders stated to have been held on the 28th of March, 1868.

Defendant's counsel then read from page 67 of the book of minutes of the Kerosene Oil Company a meeting of the trustees of the Kerosene Oil Company, held July 20, 1860, a resolution as follows:

"On motion resolved that three members of this board be a quorum for the transaction of business."

Also, from the minutes of the same meeting, as follows:

"On motion resolved that Mr. Cozzens be authorized to employ such persons as may be necessary to carry on the works, and to make such purchase of materials as may be proper to carry on the manufacture of oil."

And further:

180 "On motion resolved that the treasurer be authorized to pay any such bills as may be certified by Mr. Cozzens, and that he present at the monthly meeting of the board a trial balance of the books, a cash account, and the vouchers for the payments made by him."

Defendant's counsel then put in evidence from the said book of minutes the minutes of the meeting of 28th March, 1868.

(The complainant objected to the competency and relevancy of the foregoing evidence.)

Defendant's counsel then read in evidence the following paper, which had been previously marked Exhibit A, Jan. 24, '73, for identification.

(Copy.)

At a meeting of the trustees of the New York Kerosene Oil Company, held at the office of the company, No. 134 Pearl street, on the 9th of March, 1867, a sufficient number of said trustees being present to constitute a quorum according to the by-laws of said company, the following resolution was adopted, viz: On motion it was resolved that the president be authorized to execute a mortgage for the sum of one hundred thousand dollars on their factory and works, situate at Newtown Creek, in Newtown, Queens County, and to affix the official seal of said corporation thereto.

G. W. AUSTIN,
Secretary.

[NEW YORK KEROSENE OIL COMPANY.]
[5-cent U. S. I. R. St. Cancelled.]

(Complainant's counsel objected as before.)

Defendant's counsel also read in evidence the notarial certificate annexed, to which the same objection was made.

It is as follows:

STATE OF NEW YORK,
City and County of New York, ss:

On this nineteenth day of April, in the year one thousand and eight hundred and sixty-seven, before me personally came George W. Aus-

181 tin, secretary of the New York Kerosene Oil Company, to me personally known, who being by me duly sworn, did depose and say that he resides in the city of New York; that he is the secretary of the said The New York Kerosene Oil Company; that the seal affixed to the foregoing instrument is the corporate seal of said company; that it was affixed thereto by order of the board of directors of said company, and that he subscribed his name thereto by like authority.

F. L. OGDEN,
Notary Public, New York County.

It is admitted that the foregoing is a genuine certificate by Ogden, the notary above referred to.

Defendant's counsel also produced, and read in evidence, the consent of stockholders of the New York Kerosene Oil Company, which was admitted to be a true copy of the original, filed in the office of the clerk of Queens County, on the 29th day of April, 1876, and recorded on the 11th of May, 1867.

It is as follows:

We, the undersigned stockholders in the amounts set opposite our names, respectively, in the New York Kerosene Oil Company, a manufacturing Company formed under the acts entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, and the several acts amendatory thereof, owning more than two-thirds of the capital stock of said corporation, do hereby assent to the mortgaging by said company of all its real estate, situated in the county of Queens, to the New York Guaranty and Indemnity Company in the sum of one hundred thousand dollars, with interest thereon, to secure the payment of debts contracted, or to be contracted, in the business for which said New York Kerosene Oil Company was incorporated.

Dated New York, April 27th, 1867.

182

Names of stockholders.	No. of shares.	Amount.
Abraham M. Cozzens.....	Four thousand nine hundred and thirty-eight shares.....	$493,800

STATE OF NEW YORK,
City and County of New York, ss:

On this 27th day of April, in the year eighteen hundred and sixty-seven, before me personally came Abraham M. Cozzens, to me known to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

F. L. OGDEN,
Notary Public, New York County.

A true copy as filed April 29, 1867, and recorded May 11, 1867.

J. T. HEGEMAN,
Clerk of Queens County.

WILLIAM ALLEN BUTLER then testified on behalf of defendant as follows:

(Oath was waived by consent of complainant.)

I am counsel for the New York Guaranty and Indemnity Company, the defendant in this suit, and have been so since the organization of the company, and in connection with my firm of Barney, Butler, & Parsons, have transacted their legal business in this State.

The examination of the title of the New York Kerosene Oil Company, of the real estate described in the mortgage "Defendant's Ex. A," and the other legal steps taken in connection with the transaction, were under my own personal direction.

I first saw the mortgage, and the bond of Abraham M. Cozzens accompanying it, at the office of the New York Guaranty and In-
183 demnity Company after the 9th day of March, 1867. They had been executed, and the revenue stamps were affixed to the mortgage at the time I first saw it. I had had no previous knowledge or information in reference to the mortgage or the bond, or the transaction with which they were connected. The bond was witnessed by Mr. Samuel E. Lyon, the counsel, who, as I understood, had prepared the bond and mortgage. The papers were delivered to me by the officers of the New York Guaranty and Indemnity Company, for the purpose of having the examination of title made, and also for the purpose of having the mortgage made a valid security as therein expressed. I called upon Mr. Lyon to furnish me with the consent of stockholders required by the statute for the making of a mortgage by a manufacturing company, and I saw Mr. Lyon in reference to this matter. I also required—or he furnished me of his own motion, I don't remember which—evidence of authority given by the trustees to the president, Mr. Cozzens, to make the mortgage that he furnished in the paper already produced in evidence to-day, marked Ex. A., January 24, 1873, for identification. The consent of stockholders was prepared in my office under my direction, being the consent already produced in evidence, dated New York, April 27, 1867, and was sent by me to Mr. Lyon to be signed and filled up with the number of shares and amount of stock.

There was some delay in procuring this consent, owing to Mr. Lyon's sickness, principally. Mr. Lyon stated to me that he did not consider the formal consent necessary, in view of the fact which he stated that Mr. Cozzens was himself the owner of all, or nearly all, the capital stock of the company, and that the execution of the mortgage by him was a sufficient compliance with the statute. I however required that the consent should be given as an independent instrument for the pur-
184 pose of a literal compliance with the law, and I accordingly prepared the form of consent, and sent it to Mr. Lyon, and he returned it to me signed and executed by Abraham M. Cozzens, as appears by the certificate, and I had the consent mailed to the county clerk of Queens County for filing April 27, 1867, and received a certified copy from him, showing that it had been filed on the 29th of April, 1867, and waited for that before approving the mortgage. Under my direction the mortgage was then amended by inserting a recital that the consent of stockholders to the making of the mortgage had been first duly given and filed; and I required that the mortgage should be re-executed or acknowledged, and the date of the mortgage was altered from the original date, which was the 9th of March, to the 29th of April, and I directed that it should be re-acknowledged by Mr. Cozzens and Mr. Austin, as president and secretary. These things were completed about the 11th of May, 1867. I then considered the question whether

it was necessary for the protection of the New York Guaranty and Indemnity Company, and the validity of the mortgage, as a security for the advances made and to be made by the company, to require the bond of the New York Kerosene Oil Company to be substituted for that of Mr. Cozzens. I hesitated somewhat, whether it was necessary to have that bond, but concluded that, under all the circumstances, it was not necessary so to do, or to change the form of the paper, as they had been prepared by Mr. Lyon, regarding the steps taken, which I have already testified to, sufficient in relation to the substance of the transaction, irrespective of any question of form. I had known Mr. Cozzens for, I think, upwards of thirty years, and Mr. Austin for a great many years, and regarded Mr. Cozzens in every respect as a most honorable man, and such was his general reputation. As to the statement of the number of shares of stock owned by him, in the consent, I made no
185 examination, relying upon his statement, and, also, understanding from Mr. Lyon, at the time, that Mr. Austin, as secretary, had made an examination, to see exactly how many shares of stock Mr. Cozzens owned, which, if I recollect right, was one of the circumstances which occasioned some little delay in completing the matter.

Thee things, I said, I finished on the 11th of May. I then advised the Guaranty and Indemnity Company to close up the loan, and commence anew, at a date subsequent to the acknowledgment of the mortgage.

(Complainant's counsel objects to the competency and relevancy of the foregoing evidence, and to each part thereof.)

Defendant's counsel next read in evidence the charter of the New York Guaranty and Indemnity Company, being chapter 179 of the laws of 1864, page 362, and also an act, amending the same, passed February 10th, 1865, being chapter 20 of the laws of 1865, page 28.

Adjourned to Thursday, February 6, 1873, at 11 o'clock.

Hearing resumed Feb. 6th, 1873.

JAMES P. WALLACE recalled, examined by Mr. CHOATE.

Q. Who made out the four contracts signed by Mr. Cozzens, which you have produced here?

A. They are all in the handwriting of Mr. Ogden, treasurer of the Guaranty and Indemnity Company at that time, and who is now our treasurer.

Q. The original contracts given at the time of the original advance were prepared in your office, were they not?

A. Yes, sir.

Q. And they were not drawn by Mr. Cozzens?

A. They were probably prepared in our office; it is our practice to do so.

186 Q. Have you any doubt that they were prepared in your office and not by Mr. Cozzens?

A. I have no doubt they were prepared in our office.

Q. You are not able to say by what officer or employe of the company they were filled out; the original one you haven't here?

A. It was the business of the treasurer to attend to that department and I suppose he prepared the other ones.

Q. Are these notes in red ink on the face of the contracts, which are also signed by Mr. Cozzens, in the same handwriting on the three of them?

A. Yes, sir; the same handwriting.

Q. In the original contract, made at the time of the first advance, was it executed or not by Mr. Cozzens before he received the money?

A. Yes, sir; or simultaneously with it.

Q. Did you attend to that transaction or did Mr. Henry, the president, or some other officer?

A. I attended to it perhaps more than any other officer, although the others were present and participated.

Q. Then the original contract was executed and received by you at the time of making the advance of $50,000?

A. Yes, sir.

Q. I understood you to say, in your direct examination, that you require such a contract in the course of the business of the company in all cases of advances?

A. Yes, sir.

Q. Now, have you the check which you gave for the first advance?

Plaintiff's counsel called for the production of the check and Mr. Butler produced it. It was read by Mr. Choate, and is as follows:

187 N. Y. GUARANTY AND INDEMNITY COMPANY.

Bank of America pay to the order of Cozzens & Company forty-nine thousand two hundred and fifty dollars.

JOSHUA I. HENRY,
President.
F. J. OGDEN, *Treasurer.*

$49,250.

(Endorsed:) For deposit in the Metropolitan National Bank.
COZZENS & COMPANY.

Q. The check is filled, in so far as it is in the handwriting, in Mr. Ogden's hand, is it not, your treasurer?

A. Yes, sir.

Q. Now, on looking at that check, are you able to say with certainty in regard to the payment of commission and interest, whether the commission and interest, or either of them, were deducted, and which?

A. There was $750 deducted for commission.

Q. That is 1½ per cent. on $50,000.

A. Yes, sir.

Q. The first note for $50,000 fell due, did it not, on the 16th of April?

A. Yes, sir.

Q. Was payment of it then demanded?

A. It was not, because previous to that an arrangement had been made at Mr. Cozzens' request to let it lie over.

(Plaintiff's counsel objected to all of the answer after the word "not" as not being responsive to the question.)

Q. Look at the memorandum shown you yesterday, dated May 11th, 1867, charges on advances to 16th of April, and say if the words "Coms. pro rata $312.50" means the commissions pro rata for the period from the 16th of April to the 11th of May.

A. I think it does.

Q. And pro rata indicates at the rate of 1½ per cent. for 60 days?

188 A. Yes, sir.

Q. Now, will you produce the check, Mr. Wallace, for the second advance on the 18th of May?

Witness produced check. It is as follows:

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
New York, 18*th May*, 1867.

Continental National Bank of New York pay to the order of A. M. Cozzens twenty-four thousand six hundred and thirty-nine $\frac{50}{100}$ dollars.

JOSHUA I. HENRY,
President.
F. J. OGDEN, *Treasurer.*

$24,639 50.

(Endorsed:) A. M. Cozzens. For deposit in the Metropolitan National Bank. Cozzens & Company.

Q. That check is also filled, so far as it is in writing, in the handwriting of your treasurer, Mr. Ogden?

A. Yes, sir.

Complainant's counsel called for the check for third advance; witness produced check; it is as follows:

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
New York, 22*d of June*, 1867.

Continental National Bank pay to the order of A. M. Cozzens twenty-five thousand dollars.

$25,000.

JAMES P. WALLACE,
President.
F. J. OGDEN, *Treasurer.*

(Endorsed:) A. M. Cozzens. For deposit in the Metropolitan National Bank. Cozzens & Company.

Q. There was no deduction on this for either commission or interest?

A. No, sir.

Q. Was there any deduction on the second one, I didn't notice?

189 A. On the second one there was a deduction.

Q. What is deducted from the second check?

(Witness, after examination, states:) Commission and interest both, I think.

Q. Mr. Wallace, will you please look at the endorsements on the original bond, which have been read, dated May 11th, May 18th, and June 22d, 1867, signed by Mr. Cozzens, and say if you know where those were written and signed?

A. These are in my own handwriting, written by me at my own desk.

Q. Made when and where?

A. They were made in the office of the Guaranty and Indemnity Company at the dates here named.

Q. And then and there signed by Mr. Cozzens?

A. Yes, sir; in my presence.

Q. At the time of the subsequent advance of $25,000, and $25,000 on the 18th of May and the 22d of June, was the business transacted by you for the company?

A. Well, in some part of the time Mr. Henry and I acted together; but I acted in reference to it all through alone, or in connection with him; mostly in connection with him.

Q. And these two subsequent contracts of the 18th of May and the 22d of June were taken by you?

A. Yes, sir.

Q. You keep in that office a book in which you enter advances made?
A. Yes, sir.
Q. And did keep such a book during the period of these transactions?
A. Yes, sir.
Q. Will you furnish a transcript of the entries in that register of this advance and other subsequent renewals?
A. Yes, sir.

190 Q. In that register do you take any notice of the contracts which are required to be given when advances are made—I mean do you enter the contract?
A. The bookkeeper has the contract before him, and makes the entry in the register from the contract.
Q. But there is no reference in the register itself to the contract?
A. No further than that the register is virtually a transcript of the contract.
Q. Has the dates, names, amounts and securities?
A. Yes, sir.
Q. And the time of the maturity?
A. Yes, sir; the time of the maturity, the amount of commissions, and the amount of interest.
Q. This register was not kept by yourself, was it, Mr. Wallace?
A. No, sir; by the bookkeeper.
Q. It was kept in the office?
A. Yes, sir.
Q. You have frequent occasion to examine it?
A. I occasionally look it over.
Q. And the other officers of the company?
A. Any time they please; it is open on the desk for inspection.
Q. You stated in your direct examination that this advance of $50,000 was made on this note of A. M. Cozzens, president of the Kerosene Oil Company, and the promise of the mortgage, did you not?
A. Yes, sir.
Q. You mean by that that it was made on this note as collateral?
(Objected to as calling for an opinion.)
A. The note and the promise of the mortgage together was the collateral at that time.
Q. But you had at the same time this contract that was given with the note.
A. We had a contract indicating when——
Q. Well, you had this particular contract referred to?
A. Yes, sir.

191 Redirect examination by Mr. BUTLER:

Q. In speaking of the note and the promise of the mortgage, as you have just done, as collateral, do you mean to vary or qualify in any way the statement made in your direct examination that the advances were all made on the faith of the mortgage to be made and made, and that the advances would not have been made but for the security of the mortgage?
(Objected to as incompetent and irrelevant.)
A. I didn't mean to qualify that.
Q. The checks produced to-day, amounting in the aggregate to $100,000, less deductions for commissions and interest, where such deductions were made, are for the advances which you stated in your direct to have been made on the faith of the mortgage as a continuing security for all of the advances?

(Objected to.)

A. Yes, sir.

Q. You spoke of the contract as being made according to your mode of doing business. State whether or not the form of contract was adopted and used in your business with reference to the provisions of the charter of your company, authorizing you to take the management, custody, and charge of property, and to advance money thereon.

A. They were prepared with reference to that provision.

Q. And how with reference to enabling you to charge a commission?

(Objected to.)

A. The contracts were prepared in that way in accordance with the charter.

Q. For the purpose of enabling you to charge a commission?

A. Yes, sir.

Q. Having the note of the Kerosene Oil Company and the mort-
192 gage of the company, and the accompanying bond of Cozzens, state why it was or how it was that you required any further paper or contract.

(Objected to.)

A. It was to fix the rate of interest, the rate of commission, the time of its maturity; and because of its being the custom to use those contracts; and having printed forms we took this course.

Q. Have you ascertained by your examination of the books of Cozzens & Company, produced by the complainant, including the check-book, that all the monies which you advanced went into the bank account of Cozzens & Company?

A. Yes, sir.

Q. And they so went directly at the time at which you made the advance?

A. Yes, sir.

Q. And I understand that so far as the giving of the money or the checks which represented the money are concerned, it was all given to Mr. Cozzens?

A. Yes, sir.

Q. By checks in favor of Cozzens & Company or A. M. Cozzens?

A. Yes, sir.

Q. Now, was it or not the fact that during all the transaction, including the various advances of which you have testified, that you treated with Mr. Cozzens in the belief that he was the sole manager of the affairs of the Kerosene Oil Company, and substantially the sole party in interest in his financial affairs?

(Objected to.)

A. I did believe it, and acted on that belief.

Q. State whether or not at any time it occurred to you that it made or could make any difference in reference to the security of the mortgage for these advances whether the money or checks were given to Mr. Cozzens individually, to Cozzens & Company, or to any other payee?
193 (Objected to.)

A. It never occurred to me that it could make any difference.

Q. And I understood you to testify yesterday that you never had any knowledge, information, or suspicion of any embarrassment on the part of the Kerosene Oil Company, or any existing claims of creditors, until the failure of the company took place?

(Objected to.)

A. That was my first knowledge or suspicion.

Q. You stated that no demand was made on the first note of the Ker-

osene Oil Company when it matured on the 15th or 16th of April, 1867; explain why no demand was made.

A. Because Mr. Cozzens came in before the maturity and arranged to have it continued, and endorsed on the back of the note that he waived notice of protest.

Q. Was any new note taken in renewal of the first note until the 11th of May following?

A. No, sir.

Q. Why not; I want to know why that was allowed to lie over in that way until the 11th of May?

A. Because the mortgage had not been returned to us by our counsel with his approval.

Q. State whether or not that was the sole reason.

A. That was the sole reason.

Recross-examination:

Q. In making up your register, does the bookkeeper have the check-book before him as well as the contract?

A. Yes, sir; he has access to it, at any rate.

Q. And in stating that it was made up from the contract, do you mean to exclude the idea of his referring to the check-book in making up the register?

194 A. He is privileged to refer to the check-book if he has any doubt; I don't think it is his usual practice.

JORDAN M. FOWLER recalled.

Examined by Mr. CHOATE:

Q. Have you completed the schedules which you were asked to make the day before yesterday?

A. Yes, sir.

Q. Will you produce them?

(Witness hands them to Mr. Choate. The witness produces a paper headed "Losses on shipments of oil;" it was marked Complainant's Ex., Feb. 6, '73, W. H. P.)

Q. This schedule shows two shipments, one by the Conquest and one by the Brodine?

A. Yes, sir.

(The foregoing and following questions were taken, subject to objection.)

Q. The one of the Conquest was one of which you read an entry from the sales-book the day before yesterday?

A. Yes, sir.

Q And this schedule shows the date of shipment, the ship, the number of barrels, the invoice price, the valuation of oil, on which 7½ per cent. commission and guaranty was charged, the date of the charge made to the Kerosene Oil Company, and the amount of the loss charged to that date?

A. Yes, sir.

Q. The amount being on the Conquest charged October 23, 1866, $2,683.43, and on the Brodine April 20, 1867, $5,440.80?

A. Yes, sir.

Q. Are these all the transactions of that character in shipments of oil which you have found on the books?

A. Those are all that I found.

195 Q. Now, will you turn to the sales-book and show us the entry in the case of the Brodine—read the entry from the sales-book

(Witness looks in book.)

A. March 16, 1866, shipment to Cronstadt, per brig Brodine, consignment to Messrs. , 550 barrels of kerosene oil, at 43c., total amt. of shipment $9,559.49.

Q. Now, the loss on that was $5,440.80?

A. Yes, sir.

Q. Have you made the same schedule of cases, where there were losses on shipments of naptha, which were charged against the Kerosene Oil Company?

A. Yes, sir.

Q. And you produce this schedule (which is marked Ex. Feb. 6, '73, W. H. P.)?

A. Yes, sir.

Q. This last schedule which you have now produced, shows all the cases of such transactions in naphtha, that you find on the books, where losses have been charged against the Kerosene Oil Company?

A. Yes, sir.

Q. Now, will you turn to the sales book and show us the entry, as made in the case of the Sarah King, the first entry in the schedule?

A. Shipment to Liverpool, consignment to Messrs. Taylor, Tipper & Company, per British bark Sarah King, for Liverpool, 1,150 barrels of naptha, invoiced at 35 cents; whole amount of shipment, $16,790.58; the loss on it was $4,909.50.

Q. How was that loss first charged, and against what or whom, in the books of Cozzens & Co.?

A. The shipment is closed, by charging it to the "naptha account."

Q. Well, at what date?

A. May 25, 1866; and crediting it to the shipment to close the shipment, and then on the 27th of June, 1866, the naptha account with it, and the New York Kerosene Oil Company charged.

196 Q. Now, take the next case, of the Return, the next shipment on the schedule?

A. Shipment to London, per bark Return, joint account with Burdsley & King, December 10, 1864, 500 barrels naptha, invoiced at 28 cents, cost $5,772.74, on which there was a loss of $392.59.

Q. Where was that loss first charged, and when first charged to the Kerosene Oil Co.?

A. It was charged in naptha account, on the 18th of May, 1866, and on the 22d of June it was charged to the Kerosene Oil Company, and naptha account charged with it.

Q. This naptha account is in the books of Cozzens & Company?

A. Yes, sir.

Q. Take the next shipment, that of the Hudson?

A. January 20, 1865. Shipment to London, per ship Hudson, 600 barrels of naptha, invoiced at 32 cents, cost of shipment $7,772.16, on which there was a loss of $2,217.43. This loss was charged to the naptha account on the 18th of May, 1866, and charged to New York Kerosene Oil Company on the 27th of June, 1866.

The next is October 21, 1865. Shipment to London; consignment to Messrs. Geo. Croshaw & Co., per Br. brig Amazon, for London, 847 barrels of naptha, invoiced at 35 cents; total amount of shipment $12,250.04. On this shipment there was a loss of $4,361.41, which loss was charged to the naptha account on the 18th of May, 1866, and charged to the New York Kerosene Oil Company on the 27th of June, 1866.

The next shipment is October 30, 1865. Shipment to London; con-

signment to Messrs. Geo. Croshaw & Co., per Nor. barque Freyr, for London, 700 barrels of naptha, invoiced at 35 cents, $10,070.55, the loss was $3,340.14; charged to naptha account on the 18th of May, 1866, and to the New York Kerosene Oil Company on the 27th of June, 1866.

197 The next shipment is November 21, 1865. Shipment to London; consignment to Messrs. Geo. Croshaw & Co., per Br. brig. Todlique, for London, 300 barrels refined naptha; cost of shipment, $4,321.35; the loss was $1,651.87, which was charged to naptha account on the 18th of May, 1866, and to the New York Kerosene Oil Company on the 27th of June.

The next shipment was November 7, 1865. Shipment to Liverpool; consignment to Messrs. Taylor, Tipper & Co., per Br. barque Viking, for Liverpool, 500 barrels of refined naptha, invoiced at 35 cents; cost of shipment $7,243.03, the loss was $2,451.98, which loss was charged to naptha account on the 25th of May, 1866, and to the New York Kerosene Oil Company on the 27th of June following.

The next shipment is December 31, 1865. Shipment to London; consignment to Messrs. Burdsley and King, per Br. barque Sarah Ellen, 600 barrels of naptha, invoiced at 30 cents; total amount of shipment $7,255.35, loss on this was $3,005.08, which was charged to naptha account in Cozzens & Co.'s books on May 9, 1866, and to the New York Kerosene Oil Company on the 27th of June, 1866.

The next shipment is March 20, 1866. Shipment to Liverpool; consignment to Messrs. Taylor, Tipper & Co., per barque Jason, 1,120 barrels of naptha, invoiced at 25 cents; cost of shipment, $11,509.48; on this there was a loss of $8,179.45, which was charged to the naptha account on the 7th of November, 1866, and transferred the same day charged to the Kerosene Oil Company.

And in the case of all the other shipments in this schedule the charge to the Kerosene Oil Company was made the same day with the charge to naptha account, except the shipment per Boaz and Path Finder and the shipment by the Earl of Shaftsbury, which were charged direct to the New York Kerosene Oil Company, never having passed through naptha account.

198 Q. Now, please give the entry in the sales book and the amount of the loss and the date of charge of the remaining cases in the schedule; take the Earl of Shaftsbury first.

A. There are two entries made of this shipment in the sales book. One, April 20, 1866, shipment to London of 521 barrels of refined naptha per Earl of Shaftsbury, invoiced at 17 cents; total amount of shipment, $3,665.53; the other on the 2d of May, shipment to London, consignment to George Croshaw & Co., per barque Earl of Shaftsbury, 750 barrels of naptha, invoiced at 17 cents; total amount of shipment, $5,252.30. They are entered as one shipment in the schedule. It was the same shipment, only they arrived at the vessel at different dates. And on this entire shipment there was a loss of $7,981.36, and part of the shipment was charged to the New York Kerosene Oil Company direct, and part of it passed through the naptha account as the others. There was a loss charged March 8, 1867, of $5,538.83, that was charged direct, not having passed through the naptha account, and on October 24, 1866, there was a loss of $2,442.53 that was charged into the naptha account the same day and then charged to the New York Kerosene Oil Company.

The next shipment of May 9th and 12th was of the same nature. The first one is May 9th, shipment to Liverpool, consignment to Taylor,

Tipper & Co., per brig Mary M. Williams, 1,000 barrels of naptha, invoiced at 17 cents; total amount, $6,983.59; then on the 12th, shipment to London, consignment to Bruce, Simpson & Co., per brig Mary M. Williams, 411 barrels of naptha, invoiced at 17 cents; total amount of shipment, $2,871.31; and on the entire shipment there was a loss of $7,187.57. It was divided up into two parts on the 7th of November, 1866. There was a loss charged on that day of $5,076.76, to the naptha account, October 26th, 1866, and one of $2,110.81. Both
199 those went into naptha account, and were then charged into the New York Kerosene Oil Company afterwards on the same day.

The next shipment was 12th May, 1866. Shipment to Liverpool, consignment to Bruce, Simpson & Co., per bark Stella, 850 barrels of naptha, invoiced at 17 cents; total amount of shipment, $6,067.41. On this shipment there was a loss of $4,255.61, which was charged to the naptha account on the 26th of October, 1866, and on the same day charged into the New York Kerosene Oil Company's account.

The next shipment is of the 26th of May, 1866. Shipment to London, per brig Perseverance, consignment to Geo. Croshaw & Co., 950 barrels of naptha at 17 cents; total amount of shipment, $6,706.61. On this shipment there was a loss of $6,480.21, which was charged into the naptha account of Cozzens & Company's book on the 8th of March, 1867, and on the same day into the New York Kerosene Oil Company.

The next is August 27th, 1866. Shipment to Liverpool, consignment to Bruce, Simpson & Co., per Rjuken, 300 barrels of naptha, invoiced at 15 cents; total amount of shipment, $1,945.65; on which is a loss of $317.09; charged into naptha account, 26th October, 1866, and into the New York Kerosene Oil Company same day.

The next shipment is September 22d, 1866. Shipment to Bruce, Simpson & Co., Liverpool, England, per bark Cyrene, 500 barrels of naptha, invoiced at 15 cents; total amount of shipment, $3,132.10. On this there was a loss of $1,877.34; charged in naptha account, February 19, 1867, and to the Kerosene Oil Company same day.

The next shipment is composed of two entries in the sales book, as in some others. The first one is October 12, 1866. Shipment to Liverpool, per bark Cumberland, to Bruce, Simpson & Company, 200 barrels
200 of naptha, invoiced at 15 cents; total amount of shipment, $1,292.33. The next entry is 30th November; shipment to Liverpool, per bark Cumberland, consignment to Bruce, Simpson & Company, 550 barrels of naptha, invoiced at 15 cents; total amount of shipment, $3,678.25; on which shipment there was a loss of $2,043.64; charged to naptha account on the 19th February, 1867, and to the Kerosene Oil Company the same day.

October 25th is the next. Shipment to Liverpool, per schooner Orion, consignment to Bruce, Simpson & Company, 518 barrels of naptha, invoiced at 15 cents; total amount of shipment, $3,115.39. On this there was a loss of $2,112.16; charged to naptha account on the 19th of February, 1867, and to the New York Kerosene Oil Company the same day.

The next shipment is October 30, 1866. To Liverpool, per bark Annie Sherwood, consignment to Bruce, Simpson & Company, 500 barrels of naptha, invoiced at 15 cents; total amount of shipment, $3,211.65; on which there was a loss of $1,872.08, which was charged to naptha account on the 19th of February, 1867, and to the Kerosene Oil Company on the same day.

The next is October 31, 1866. To Antwerp, per bark Kathleen, consignment to Augustus Notebohm, 200 barrels of naptha, invoiced at

15 cents; total amount of shipment, $1,322.63. On this shipment there was a loss of $544.64, which was charged in naptha account in Cozzens & Company's book on the 19th of March, 1867, and to the Kerosene Oil Company on the same day.

The next is November 23d, 1866. Shipment to Liverpool per ship Rhea Silvia; consigned to Taylor, Tipper & Co., 1,000 barrels of naptha, invoiced at 15 cents; total amount of shipment, $6,572.20, on which there was a loss of $2,470.81, which was charged to naptha account on
201 the 25th of March, 1867, and to the Kerosene Oil Company on the same day.

The next was April, 8th, 1867. Shipment to Liverpool, per barque Boaz; consignment to Messrs. Bruce, Simpson & Co., 120 barrels of naptha, invoiced at 13 cents; total amount of shipment, $7,042$\frac{20}{100}$; on which shipment there was a loss of $3,141. This was charged into naptha account on the 23d of October, 1867, and charged to the New York Kerosene Oil Company on the 30th of November, 1867.

The next shipment is composed of two entries again. The first one April 23, 1867. Shipment to Liverpool, per barque Pathfinder; consignment to Messrs. Bruce, Simpson & Company, 500 barrels of naptha, invoiced at 13 cents; total amount of shipment, $2,833$\frac{11}{100}$.

The next entry is on the 14th of May, 1867. Shipment to Liverpool, per barque Pathfinder; consignment to Bruce, Simpson & Company, 377 barrels of naptha, invoiced at 13 cents; total amount of shipment, $2,401$\frac{69}{100}$. On this shipment there was a loss of $2,934$\frac{68}{100}$, which was charged into naptha account on the 23d of October, 1867, and to the New York Kerosene Oil Company on the 30th of November, 1867.

That is all in that schedule.

Q. Now, what is this as represented by this sum stated as giving the total valuation or cost of the shipment?

A. Well, it was entered on these books here at the market price—the price it was selling on the day it was shipped.

Q. The valuation at the price so many cents given per gallon?

A. Charges are added, marking, lading, tinning, lighterage, and all expenses of getting it on board the ship, charged to expenses of shipment.

Q. Expenses of shipment are included in making up that sum?

A. Yes, sir.

202 Q. Does that sum represent the credit made to the Kerosene Oil Company?

A. Yes, sir.

Q. At the time of shipment?

A. The total amount of shipment was credited to the Kerosene Oil Company, yes, sir, in every case at the end of the month.

Q. Was there any book kept by Cozzens & Company containing a record of shipments by them except this sales book?

A. None but this one; that is all.

Q. Do you know whether in any instance, and if so in what, this valuation, the value was advanced by any party other than Cozzens & Company at the time of shipment, being the full value of the oil?

A. I don't know of any instance in which the full value has been advanced.

Q. Was it their practice to draw on parties abroad?

A. When we shipped direct it was; when we shipped through agents the agents drew and gave us the proceeds of the exchange?

Q. And for these amounts—these valuations?

A. No, not for the whole amount of the invoice.

Q. Then, either you drew for some part of this valuation on the foreign houses; that is, Cozzens & Company drew, or the agent of the foreign house drew, for some part, and Cozzens & Company received the proceeds of these drafts?

A. Yes, sir.

Q. You have also prepared a schedule of the cases in which, on shipment of naptha, there appeared to have been profits which were credited to the New York Kerosene Oil Company, and you produce this paper, this schedule?

A. Yes, sir, of the profits.

Q. This schedule contains the same detail as the last schedule, does it?

A. Yes, sir.

203 Q. The date of the shipment, the name of the ship, the number of barrels, the invoice price per gallon, the valuation of the shipment, the date when the profit was credited in naptha account, and the date when it was credited to the New York Kerosene Oil Company?

A. Yes, sir; and the amounts.

Q. Go through that schedule the same as you did the last, giving us the information in the sales book?

A. The first shipment is on the 19th of September, 1865. Shipment to Liverpool; consignment to Messrs. Taylor, Tipper & Co., in the barque Princess Royal, for Liverpool, 880 barrels of naptha, invoiced at 35 cents; total value of cargo, $12,659.13. On this shipment there was a profit of $2,049.19, which was credited to naptha account on the 18th of April, 1866, and credited to the New York Kerosene Oil Company on the 27th of June, 1866.

The next shipment is December 2, 1865. Shipment to Liverpool; consignment to Messrs. Taylor, Tipper & Co., per brig Wm. Carey, for Liverpool, 288 barrels refined naptha, invoiced at 35 cents; total amount of shipment, $4,137.24. On this shipment there was a profit of $237.73, which was credited to naptha account on the 29th of May, 1866, and the New York Kerosene Oil Company on the same day.

The next is August 31, 1866. Shipment to Hamburg for account of New York Kerosene Oil Company; consigned to by Schepeler & Co., per ship Doctor Bath, 500 barrels of naptha, invoiced at 15 cents; total amount of shipment, $3,210.05.

Q. In whose handwriting is that entry?

A. My own; it was when I first went there.

By Mr. BUTLER:

Q. What date is that?

A. On the 31st of August, 1866.

204 On this shipment there was a profit of $585.52, which was credited naptha account on the 20th of April, 1867, and to the New York Kerosene Oil Company on the same day.

The next shipment is March 5, 1867. Shipment to Liverpool, per barque Jessie; consignment to Bruce, Simpson & Co., 650 barrels of naptha, invoiced at 13 cents; total amount of shipment, $3,834.09. On this shipment there was a profit of $1,174.83, which was credited to the naptha account on the 22d of May, 1867, and to the New York Kerosene Oil Company on the same day.

The next is June 8, 1867. Shipment to Antwerp, per bark Eureka; consignment to Nottebohm Bros., per C. Bors, 300 barrels of naptha, invoiced at 13 cents; total amount of shipment, $1,817.69. On this there was a profit of $195.02, credited to naptha account on 20th Decem-

ber, 1867, and to the New York Kerosene Oil Company on the 31st of December, 1867.

The next shipment is on the 24th of July, 1867. Shipment to Antwerp, per bark Rhea, through Mr. Christian Bors, 200 barrels of naptha, invoiced at 13 cents; total amount of shipment, $1,175.52. On this there was a profit of $222.53, which was credited to the naptha account on the 20th December, 1867, and to the New York Kerosene Oil Company 31st December, 1867.

The next shipment is on the 20th August, 1867. Shipment to Hamburg, through Schepeler & Co., per brig Helena. There are two entries of this that date. The first entry is 73 barrels of gasoline at 13 cents; total amount of shipment, $416.59. The next is: Shipped to Hamburg, through Schepeler & Co., per brig Helena, 227 barrels of naptha, invoiced at 13 cents; total amount of shipment, $1,291.70. There is a third entry on the 15th: Shipment to Hamburg, through Messrs.
205 Schepeler & Co., per brig Helena, 500 barrels of naptha; full amount, $2,847.41. These three entries are one shipment. On this shipment there was a profit of $1,167.17, which was credited to the naptha account on the 14th December, 1867, and to the New York Kerosene Oil Company on the 31st December, 1867.

The next shipment was on the 28th of September, 1867. Shipment to Antwerp, through Mr. C. Bors, per schooner Superb, 600 barrels of naptha, invoiced at 15 cents; amount of shipment, $3,284.43; on which shipment there was a profit of $1,409.85, which was credited to naptha account on the 30th of December, 1867, and credited to the New York Kerosene Oil Company on the 31st of December, 1867.

That is all on that schedule.

Q. Were the values of those shipments credited to the New York Kerosene Oil Company by Cozzens & Company the same as the shipment in the second schedule produced by you, at the time of the shipment?

A. Yes, sir.

Q. And the same is true of the values of the two shipments on the first schedule produced by you?

A. Yes, sir.

Q. And on all these values a 7½ per cent. commission and guaranty was put on these values?

A. I have not been through the account to be sure of it, but I know it was the general custom, and I didn't see any entry where it was taken off.

Q. I am speaking of the original charge; that was your testimony, I think?

A. Yes, sir; the 7½ per cent. is charged.

Q. This book which is labeled on the back "Sales, Cozzens & Company," runs from the first of January, 1862, to the end of the business continuously, does it not?

A. Yes, sir; to the last of January, 1868.

Q. Did you keep this book from the time you came there?

206 A. I did until the bookkeeper died; then I took charge of the books and cash account until Mr. Austin's death.

Q. And from that time who kept it?

A. Mr. Cozzens' son, Edward C. Cozzens.

Q. Where do your entries begin in this book?

A. 30th of April, 1866.

Q. Before that whose handwriting is it?

A. Mr. Edward C. Cozzens'; during the year 1865, it is Edward Cozzens'.

Q. How far do your entries extend after the 30th of April, 1866?

A. Down to the latter part of April, 1867, 18th of April, 1867; still, I made frequently an entry when——

Q. You made frequent entries after that?

A. (Witness looking through book.) I thought I had; I guess all the rest of it is in Mr. Edward Cozzens' handwriting.

Q. After you stopped keeping it, Mr. Edward Cozzens kept it?

A. Yes, sir.

Cross examination:

Q. The naptha referred to in those accounts, and which was the subject of those several shipments, is the product of petroleum, is it not?

A. Yes, sir.

Q. And so of gasoline?

A. Yes, sir.

Q. And the oil shipped was also a product?

A. Yes, sir.

Q. About what proportion of the product of the works was shipped, as compared with sales made in the market here?

A. That I cannot tell, it varied so.

Q. The oil and naptha were taken directly from the works to the vessel, was it not?

A. Yes, sir.

207 Q. And you have no knowledge in reference to quantities or times of shipments, or amounts of shipments, except such as you have derived from the books?

A. That is all; well, I have a knowledge from making up bills of lading and such things; getting the ship's receipt, and making the bills of lading, and drawing the exchange.

Q. Well, you have no doubt that all of these were actual shipments of oil or naptha manufactured at the works?

A. I have not the slightest doubt of it.

Q. In what way was the valuation on which the commission and guaranty was charged, arrived at?

A. Mr. Cozzens always used to name the price, and I entered it in the sales book, which I think was the market price.

By Mr. CHOATE:

Q. That is, the price per gallon?

A. Yes, sir.

By Mr. BUTLER:

Q. In the entries of the valuation or invoice price, made in the books by you, you followed the directions of Mr. Cozzens?

A. Yes, sir.

Q. Didn't yourself ascertain either the cost of production or the ruling price in the market?

A. No, sir.

Q. Was the valuation as ascertained, credited to the New York Kerosene Oil Company in the account at the end of each month?

A. Yes, sir.

Q. The same as proceeds of actual sales would be?

A. Just the same.

Q. The entries at the end of the month formed separate valuations, or were the separate valuations included in the gross sum?

A. The gross amount of these shipments and the sales were credited in bulk to the New York Kerosene Oil Company at the end of each month.

208 Q. But did not generally show the detailed statements?

A. It generally did not.

Q. But did not the journal show a detailed statement?

A. The journal did not; in our book it was posted right from the sales book to the ledger of Cozzens & Co. to the credit of shipments.

Q. But I want to know how the separate valuation of each shipment at the end of each month appeared in the account of the Kerosene Oil Company with Cozzens & Co.

A. The whole of the shipments for the month were added up at the end of the month, and the sum total credited to the New York Kerosene Oil Company together with the actual sales of oil made in the market here.

Q. These related only to the product of the works whether sales in the market or shipments abroad?

A. Yes, sir.

Q. And each of the separate valuations stated in the schedules which you have produced, was actually at the end of the month in which it is stated here to have been charged, credited to the Kerosene Oil Company in account with Cozzens & Co.?

A. Yes, sir.

Q. Advances were procured, as I understand, on the security of the bills of lading, representing the sales and naptha so shipped?

A. Yes, sir.

Q. And the proceeds of those advances went usually into the general bank account of Cozzens & Co.?

A. Yes, sir.

Q. And were not the subject of any entry in the account between the Kerosene Oil Company?

A. No, sir.

209 Q. The property so shipped, represented by the bills of lading, was the security for the advances so procured, was it not?

A. We procured the advances on the bills of lading.

Q. Which represented the property?

A. Yes, sir.

Q. When the result of the shipment was ascertained, if there was a profit, that was credited, was it not, to the Kerosene Oil Company by Cozzens & Co.?

A. Yes, sir.

Q. Irrespective of the advances?

A. Yes, sir; that is the profit of the entire shipment.

Q. And if there was a loss it was charged, debited to the Kerosene Oil Company?

A. Yes, sir.

Q. Irrespective of the advances?

A. Yes, sir.

Q. Then I understand you, that so far as the advances procured by Cozzens & Co., on the faith or security of these shipments relate, nothing appears in the books of the Kerosene Oil Company, or in the account of the Kerosene Oil Company with Cozzens & Co., in the books of Cozzens & Co.?

A. No, sir.

Q. Taking these three schedules together, the entire loss on all naptha shipments appears to be $\$73{,}728\frac{24}{100}$; and the entire loss on oil ship-

ments, $8,124\frac{23}{100}$; making a total of $81,852\frac{47}{100}$; the profit on the naptha shipments was $7,051.84, leaving a net loss of $74,800.63?

A. Those are my figures, I believe.

Q. These figures are correct, are they not?

A. Yes, sir.

Q. What would the commission and guaranty of 7½ per cent. be on that sum?

A. $5,610\frac{04}{100}$.

210 Q. So far as the question of commission and guaranty is concerned, if it were charged back to Cozzens & Co., it will make a difference only of $5,610.04 in the account?

A. Yes, sir; or loss.

Q. That is all the difference it would make if you charged Cozzens & Co. now with the whole commission and guaranty, it would make only the difference of $5,610\frac{04}{100}$ in their account?

A. Yes, sir.

Q So far as you know, Mr. Cozzens had the entire control of all these shipments, had he not?

A. Yes, sir.

Q. And it rested entirely with him, whether he sold in the market here, or shipped abroad?

A. Yes, sir.

Q. During the same times that these shipments were made, was he making sales in the market here?

A. Not much of naptha.

Q. Was he of oil?

A. Yes, sir.

Q. And as a matter of discretion, have you any knowledge whether it was better for the company to sell the naptha here, or to send it abroad?

(Objected to.)

A. There was not much market here at the time; they thought they could do better by sending it abroad.

Q. So far as you knew at any time, were these shipments of naptha, by Cozzens, or Cozzens & Co., legitimate business transactions?

A. I never knew anything more than that the shipments were made, and the entries properly made according to the transactions.

Q. And that they were shipments of the products of the works?

A. Yes, sir.

Q. And the company, the Kerosene Oil Company, was credited with the valuations, irrespective of the advances?

211 A. Yes, sir.

Q. And in every case on which there was a profit, that profit was credited to the Kerosene Oil Company?

A. Profits on shipments of naptha; yes, sir.

Q. It appears from the book of minutes, Mr. Fowler, that no meeting of the stockholders of the Kerosene Oil Company, or trustees, was held from March 9th, 1867, until March 28th, 1868; was the latter date after the failure of Cozzens & Co., and the death of Mr. Cozzens?

A. Yes; it was after his death.

Q. When did the failure occur?

A. I think we suspended payment on the 28th, as near as I can remember.

Q. How soon after that did Mr. Cozzens die?

A. About a week.

Q. His death was almost immediately after the failure?

A. Yes; shortly after the failure; in the middle of the week.

Q. And was supposed to be caused by the failure?

A. Yes, sir.

Q. You mean that his illness and death were consequent upon the troubles occurring and growing out of the failure?

A. The physicians said so.

Q. You so understood at the time?

A. Yes, sir.

Q. You stated in your direct examination that you were secretary of the company; the book of minutes shows no act done by you as secretary until the 28th of March, 1868; did you do any act, as secretary, before that time?

WITNESS. Before that first meeting?

Q. Before that meeting of March, 1868?

212 A. I don't remember any, unless it was to make out the report of the company, or something of that kind; I don't think that I made out any report until that date.

Q. Then you don't remember that you did any act as secretary until the 28th March, 1868?

A. No, sir.

Q. When you speak of having been appointed secretary, what was the mode of your appointment?

(Objected to, as incompetent.)

A. Well, it was rather an informal thing; Mr. Cozzens notified me of the fact himself; I mean Mr. F. H. Cozzens; that was all there was about it.

Q. Who told you that you were to act as secretary of the company?

(Objected to.)

A. He wanted me to be secretary of the company.

Q. And that date you fixed, in your previous examination, as about the time of Mr. Austin's death?

A. It was immediately after Mr. Austin's death.

Q. From that time, down to the time of the meeting, in March, 1868, did you know any person claiming to be a stockholder in the company, except Abraham M. Cozzens?

A. I think I knew of the stockholders, whose names were entered on the stock ledger; these were all I knew of.

Q. Now, aside from that, did you know during that time any person claiming to be actually interested, as a stockholder, except Mr. Cozzens?

(Objected to.)

A. No, sir; I did not.

Q. Is it a fact of their being no meeting of stockholders, or trustees, other than those referred to and entered in the minutes, owing to the entire control which Mr. Cozzens had of the property and affairs of the company?

(Objected to.)

213 A. I don't know whether that was the reason or not; I know that he had the entire control.

Q. And you know no other reason?

A. No, sir.

Q. I think you stated in your former examination, that no one of the debts proved against the estate of the Kerosene Oil Company, in bankruptcy, is the subject of any entry, so far as you have been able to ascertain, in the books of the Kerosene Oil Company?

A. I think not, sir; that is, I do not think that any one of those debts appears in any of the books of the Kerosene Oil Company.

Redirect:

Q. Mr. Fowler, you just stated in your recross-examination, that in these transactions in oil and naptha the profits were credited in every instance, if there was a profit, to the Kerosene Oil Company, and the loss charged, if there was a loss, to the Kerosene Oil Company?

A. Yes, sir.

Q. Those losses and profits were credited at the times and in the manner that you have stated to day?

A. Yes, sir,

Q. Please turn to the books of Cozzens & Co., and show in what form the entry was made for the credit at the end of each month for sales and shipments?

A. At the end of each month there is an entry in the sales book headed "Recapitulation of sales" for the month, which shows the total of the sales and shipments in one item. It shows the cost of lading which was paid at the works; the difference is divided between oils, barrels, boxes, cans, and sundries; from this entry it is carried into the ledger of Cozzens & Co., in the account of the New York Kerosene Oil Co., first the credit "by sales of oil" for the month, then the credit "by sales of barrels," if any; then the credit "by sales of boxes
214 and cans;" then the credit by sales of sundries." These last four items together being the whole amount of the sales and shipments in the sales book, less the lading.

Q. Does this sales book include any transactions by Cozzens & Co. in oil or other things not the product of the works?

A. No, sir; it does not.

Q. And the items, barrels, cans, boxes and sundries, are boxes and and barrels and cans and other things which have been at some time purchased or made for the works?

A. Yes, sir.

Q. Do you remember, Mr. Fowler, what led to the entry in the case of the "Dr. Bath" of the words "for account," or "on account," of N. Y. Kerosene Oil Co.?

A. I don't remember anything about it; it is in my handwriting, and I must have had instructions from Mr. Cozzens, or else I would not put it there.

Q. So far as you kept this sales book it was under the general direction of Mr. Cozzens?

A. Yes, sir.

Recross:

Q. Mr. Fowler, the shipments all were very trifling compared with the sales?

A. Yes, sir.

Q. There are some shipments that are not closed up, and you do not know whether there was a profit or loss on them?

A. In the three or four last months of the business we made shipments abroad which have never been closed.

Q. Irrespective of those, the shipments of oil prior to that time as compared with the sales were very inconsiderable comparatively?

A. Yes, sir.

Q. How as to shipments of nap'tha compared with sales—was the naptha generally shipped?

A. The naptha was generally shipped.

Q. And these amounts which at the end of each month were
215 entered into the gross amount of the sales credited to the New

York Kerosene Oil Company as shipments of nap'tha, how do they compare with the total amount as to quantity?

A. They were comparatively small.

Q. The salesbook in which the original entries of the valuations were made exhibited accurately the valuation of each separate shipment, the ascertained value, did it not?

A. Yes, sir.

Q. And that book contained no other entries except those which related to sales or shipments, and which at the end of each month were credited to the Kerosene Oil Company?

A. Yes, sir.

Q. So that the item in the ledger entered at the end of each month to the credit of the Kerosene Oil Company shows the aggregate of all the separate sales and shipments appearing on the salesbook?

A. Yes, sir.

Q. And as a matter of bookkeeping these items were properly posted directly from the salesbook to the ledger?

A. Yes, sir.

Q. You identify this book as the salesbook of Cozzens & Co. to which your evidence relates, marked for identification?

A. Yes, sir.

Adjourned to Tuesday, February 11, 1873, at 11 o'clock.

Tuesday, February 11. Adjourned to Feb. 12, same hour.

216 Hearing resumed February 12, 1873.

JOHN W. MARDEN, called on behalf of defendant, and being duly sworn, testified as follows:

Examined by Mr. BUTLER:

Q. What is your business, Mr. Marden?

A. I am bookkeeper for the New York Guaranty and Indemnity Company.

Q. How long have you been such?

A. Seven years.

Q. Have you had experience as a practical bookkeeper?

A. Twenty years.

Q. In the city of New York?

A. Most of the time.

Q. Keeping the accounts of merchants?

A. Yes, sir.

Q. Have you made the transcript from the register of advances and securities of the New York Guaranty and Indemnity Company of the entries relating to the transactions involved in this suit?

A. I have.

Q. Please state what the book is which is called on this transcript "Register of advances and securities?"

A. Well, it is just what the name designates; a register in which a list of all the securities for advances are entered, together with the number, date of advance, due date, name of consignor, description of the security, rate of commission, amount of advance and the other particulars designated in the heading.

Q. Are the two sheets now produced and shown you true copies from the "Register of advances and securities" of the New York Guaranty and Indemnity Company?

A. They are.

Q. And they contain all the entries in the register relating to the transactions involved in this suit?

217 A. Yes, sir.

(They were read in evidence and marked Def't's Exhibits L and M respectively, Feb. 12, 1873, W. H. P.)

Q. Who made the original entries in the register, Mr. Marden?

A. Several of these first entries in this case were made by Mr. Rossiter, an employee of the company.

Q. (By Mr. CHOATE.) In both of these?

A. The four in Exhibit L are; at any rate the three first were made by Mr. Rossiter.

Q. (By Mr. CHOATE.) This Mr. Rossiter was then a clerk there?

A. Yes, and still is employed there.

Q. (By Mr. BUTLER.) Who is now in Alabama on business for the company?

A. Yes, sir.

Q. And has been there since this trial commenced?

A. Yes, sir. The remaining entries were made by myself.

Q. (By Mr. CHOATE.) In both L and M?

A. Yes, sir.

Q. (By Mr. BUTLER.) In making the entries in the register of advances, from what information were they made?

A. From the printed contract.

Q. (By Mr. CHOATE.) After it is completed, of course?

A. Yes, sir.

Q. (By Mr. BUTLER.) Mr. Marden, have you examined, and to what extent, the books of Cozzens & Company and the books of the Kerosene Oil Company produced on this hearing?

A. I have spent some time in their examination.

Q. State whether or not you are familiar with those books, and the manner in which the accounts appear to have been kept therein.

A. I think I am.

218 Q. Have you also examined the schedule of creditors of the Kerosene Oil Company annexed to the original petition in bankruptcy of Complainant's Exhibit B, now shown you?

A. As regards the names and amounts I have.

Q. The schedule to which I refer is marked "Schedule A, numbers 1, 2, 3, 4, and 5," and is verified by John Perkins, treasurer of the New York Kerosene Oil Company; that is so, is it not?

A. Yes, sir.

Q. State whether or not any of the creditors named in the schedule above referred to, or the debts stated therein, appear in any manner upon any of the books of the Kerosene Oil Company which have been produced upon this hearing?

Mr. CHOATE. Those schedules give the specifications, time, and amount, do they not?

Mr. BUTLER. Yes, sir.

A. I do not find any of them on the books of the Kerosene Oil Company, with one exception; in that case the account is closed.

Q. State what that is—what the name of the creditor is.

A. Cooper, Hewitt & Co.'s name appears on the books, but the account is closed. It is apparently for a different account. With that exception I do not find a name at all.

Q. And you do not find any account of Cooper, Hewitt & Company

on the Kerosene Oil Company's books, the debt mentioned in the schedule of creditors?

A. No, sir.

Q. Then so far as the books of the Kerosene Oil Company are concerned there is no entry in any of them, or anything to show that any of these persons or firms or corporations whose names are stated in Schedule A, as creditors of the company, were such creditors?

219 A. No.

Q. Please state what are the books of the Kerosene Oil Company which have been produced by the complainants on this hearing.

A. They appear to be a record of the transactions of that company.

Q. I want to know the names.

A. There is a ledger, cash book, journal, and book of minutes; I do not know that there is any other.

Q. No check-book is produced?

A. I have not seen any.

Q. Those books are now all here present, are they not?

A. I believe they are.

Q. Well, they are; there is no question about it.

A. They are.

Q. State what period of time is embraced in the entries in the cash book?

A. From July 21, 1860, to July 22, 1864.

Q. Commencing on page 2 and ending on page 231?

A. Yes, sir.

Q. And the remaining 122 pages of the cash book contain no entry?

A. No, sir.

Q. And are blank?

A. And are blank.

Q. This cash book contains a simple debit and credit account of cash, does it not?

A. Yes, sir.

Q. State what constitutes the debit side of the entries in this cash book, what they are; say what they are with trifling exceptions; if that is so, you can tell what the exceptions are.

A. They are mostly receipts from Cozzens & Company, of sales, of proceeds of sales of oil.

Q. With the exception of receipts from Cozzens & Company of proceeds of sales of oil, what do you find to be the remaining debit entries?

220 A. Proceeds of fuel, coal, and balance of a few small personal accounts.

Q. And what constitute the credit side of this account?

A. They appear to be drafts from different parties, and other payments.

Q. As compared with the amount of receipts of cash from Cozzens & Company, what is the residue of receipts to which you have referred as entered on the debit side of these accounts?

A. I should say the amount was very small.

Q. Can you give it any nearer than that, as to what percentage the amount was?

A. I should judge about 10 per cent. of the whole.

Q. Then the receipts other than from Cozzens & Co. were not more than 10 per cent. of the whole?

A. I should think not.

Q. The last entries on pages 230 and 231 of the cash book relate, do they not, to an exchange of checks?

A. They do.

Q. And also to balance drawn from the Seventh Ward Bank?

A. Yes, sir.

Q. State from your knowledge and practice as a bookkeeper what you would say as to the Kerosene Oil Company having had at that time, up to that time, a bank account and check-book, speaking from the entries in the cash book?

A. I should infer from this entry that there had been an exchange of checks between the Kerosene Oil Company and Cozzens & Company.

Q. And what would you infer as to that balance from the Seventh Ward Bank?

A. It looks so from this entry; I would infer it was a balance of the company.

Q. And that balance of the Kerosene Oil Company in the Seventh Ward Bank was drawn out by a check in favor of Cozzens & Company?

A. Yes, sir.

221 Q. Please read the entry from which you infer this last state of facts.

A. July 20. By Cozzens & Company, sales, amount of balance drawn from the Seventh Ward Bank, $443.33.

Q. And what do you find from the books of Cozzens & Company in respect to all the cash receipts and disbursements of the Kerosene Oil Company, or relating to its business after July, 1864? I mean in respect to the mode of doing business.

A. The whole amount of the cash receipts and disbursements.

Q. Are on the books of Cozzens & Company?

A. Yes; they appear to be there.

Q. All the cash receipts and disbursements of the business of the Kerosene Oil Company appear in the books of Cozzens & Company, as far as they appear at all?

A. Yes; they also appear in the journal of the Kerosene Oil Company.

Q. All the receipts from sales of oil, which up to July, 1864, were debited in the cash book of the Kerosene Oil Company, are subsequent to that time credited in the books of Cozzens & Company?

A. Yes, sir.

Q. And all expenses and disbursements in the business of the Kerosen Oil Company are debited to the Kerosene Oil Company in the books of Cozzens & Company?

A. All made by Cozzens & Company—all the disbursements made by Cozzens.

Q. All that appear anywhere?

A. All that appear.

Q. (By Mr. CHOATE.) As far as the books show?

By Mr. BUTLER:

Q. And all moneys received by Cozzens & Company, and deposited in the bank, were so deposited in one general bank account so far as the books show, were they not?

222 A. I think so.

Q. And all disbursements and payments made by Cozzens & Co., whether for account of the Kerosene Oil Company, or their account, were made from such general bank account?

A. Yes, sir.

Q. It so appears?

A. It so appears.

Q. Please state what the accounts in the other books of the Kerosene Oil Company, the journal and ledger, subsequent to July, 1864, consist of.

A. A large proportion consist of transactions with the firm of Cozzens & Company.

Q. All of which appear in the books of Cozzens & Co.?

A. All of which appear in the books of Cozzens & Co.

Q. Are there any transactions in the journal and ledger of the Kerosene Oil Company after July, 1864, which relate to other transactions, except as to matters of account as distinguished from cash transactions?

A. I have not found any.

Q. Then so far as cash transactions are concerned, nothing appears in the books of the Kerosene Oil Company, except what is contained in the books of Cozzens & Company?

A. No, sir.

Q. The journal of the Kerosene Oil Company appears to be made up principally of entries under the heading of "sundries, debtor to Cozzens & Co." and "Cozzens & Co., debtor to sundries"; please explain, as a matter of bookkeeping, what these accounts represent, or what they in fact—what they appear to contain?

A. (Witness refers to journal.) The entries headed "Sundries, debtor to Cozzens & Co." consist of amounts disbursed for the New York
223 Kerosene Oil Company for items, fuel, coals and all disbursements by Cozzens & Company for the Kerosene Oil Company.

Q. And "Cozzens & Co., debtor to sundries"?

By Mr. CHOATE:

Q. That is on the credit side that you have just given us?

A. Yes, sir; that Cozzens & Company credited.

By Mr. BUTLER:

Q. Now, "Cozzens & Co., debtor to sundries"?

A. A large proportion is for sales of oil.

Q. And any other cash receipts?

A. Yes, sir; expense account debtor on account of the Kerosene Oil Company.

Q. Entered on the books of Cozzens & Co.?

A. Yes, sir.

Q. And these accounts respectively appear to be, and are, transposed from the books of Cozzens & Co.?

A. Yes, sir.

Q. Can you state whether any other accounts in the journal or ledger are accounts which balance each other without reference to the cash?

A. Yes, sir; such entries as "Interest, debtor to Cozzens & Co.," cross entries.

Q. Please look at Cozzens & Co.'s check book, marked Ex. F, showing the deposits made and checks drawn in February, 1867, and state what amount of cash Cozzens & Company had in the Metropolitan Bank on the 14th of February, 1867.

(Objected to.)

A. They were overdrawn. The balance against them at the end of the day on the 14th was $20,873.96.

Q. On the 14th of February, does it or not appear that they paid by

check to Maitland, Phelps & Co. a loan of $15,000, made on the 12th, with two days' interest?

A. It does.

224 Q. State what deposits were made on the 15th of February, 1867.

(Objected to.)

A. Two checks were deposited on the 15th of February. Kirkland & Von Sachs for $15,000, and the New York Guaranty and Indemnity Company $49,250, making a deposit of $64,250.

Q. Does it appear by the check-book what the $15,000 from Kirkland & Von Sachs was?

(Objected to.)

A. It appears by the entry of the check that on the 16th of February a check was drawn in favor of Kirkland & Von Sachs for $15,000, and one day's interest, being $15,002.91.

Q. Please state the condition of the bank account on the 17th of May, 1867, and the 21st of June, 1867.

(Objected to.)

A. That carries it to anather book. (Looking in the check-book Ex. G, January 24, 1873.) On the evening of May 18th they carried forward a balance in bank account of $1,048.45.

Q. Take the 17th?

A. They carried forward a balance on the 17th of May of $285.01.

Q. And on the 18th of May, their gross deposits were how much?

A. Their deposits on the 18th of May were $38,823.56, of which the New York Guaranty and Indemnity Company's check was $24,639.58; $10,000, wnich was a loan, returned May 22d, with four days' interest, by check on the Metropolitan Bank.

Q. What is the next, June 21?

A. On June 21 the account was overdrawn $739.70. On the 22d the deposits amount to $27,500, made up as follows: New York Guaranty and Indemnity Company, $5,000, and Kirkland & Von Sachs, $2,500.

225 Kirkland & Von Sachs' loan was repaid June 25, with three days' interest, by check for $2,501.46 The balance carried over at the end of June 22d, in bank, was $113.48.

Q. You were present during the examination of Mr. Fowler, the bookkeeper of Cozzens & Co., were you not?

A. I was.

Q. And heard his testimony in reference to the indebtedness of the Kerosene Oil Company to Cozzens & Co., on the ledger balances exhibiting such indebtedness?

A. Yes, sir.

Q. State whether you have examined the books in reference to these balances, and what the result of your examination is as confirming the testimony of Mr. Fowler and the correctness of the ledger balances, or otherwise.

A. Well, I have examined the balances, both on the books of the Kerosene Oil Company and Cozzens & Company, as regards Cozzens & Co.'s account, and I find Mr. Fowler's evidence confirmed; and also that the books of the Kerosene Oil Company and Cozzens & Co. correspond as regards balances.

Q. And show the balance of indebtedness of the Kerosene Oil Company to Cozzens & Company as stated on those several ledger balances which have been put in evidence?

A. Yes, sir.

Q. And state whether or not at all times between the 14th of Febru-

ary, 1867, and the 23d of June, 1867, such balances exceed $100,000 on the books.

A. I can say from the 28th of February; I do not know as I can say from the 14th. I can say from the 28th of February to the 30th of June the balance in favor of Cozzens & Company was over $100,000. I cannot say as to the 14th of February; but on the 31st of January it was $91,000. From the 28th of February till the 30th of June it exceeded $100,000, and how much it increased between the 31st of January, 1867, and the 15th of February I have not examined; but on the 28th of February it had reached $118,000.

226

Cross-examined by Mr. CHOATE:

Q. Mr. Marden, at the end of February 15, 1867, what appears to have been the state of Cozzens & Co.'s bank account by the check-book?

A. On the evening of February 15, by the books, there was a balance in bank to his favor of $16,715.27.

Q. State what amount appeared to have been drawn out by check on the 15th of February; for what accounts.

A. Check or checks to the amount of $5,346 on account of the New York Kerosene Oil Company account, G. C. Gibbs; then A. M. Cozzens, $203.60; then additional checks to the amount of $21,036.17. It appears from examination that it was to repay money borrowed on the 30th of January and 9th February.

Q. And on those dates you find deposits of corresponding amounts from Stone, Nichols & Co., and Kirkland & Von Sachs?

A. Yes. Then an additional check for $75; to J. M. M. Fowler, $25; and G. W. Austin, trustee, $50. Those are all the checks on the 15th.

Q. And the check to Kirkland & Von Sachs was drawn on the 16th to repay a loan of $15,000?

A. Yes.

Q. That is the one you have already referred to?

A. Yes, sir.

Q. And that left, at the end of the 15th, how much in bank?

A. At the end of the 15th it left a balance of $16,715.27.

Q. What appears to have been the first check drawn out on the 16th of February?

A. A check in favor of Kirkland & Von Sachs for $15,002.91.

227

Q. This is the same check that you referred to in your direct examination?

A. Yes, sir.

Q. Does it appear by the check book that that was drawn before any deposit was made that day?

A. Well, I am unable to state.

Q. Is it entered in the book on an earlier page than any entry of deposit on that day?

A. It is, but it wouldn't follow that it was drawn before that deposit was made. I can answer that question a little different from examination. I should infer that that check was drawn before the deposit was made because the way the balance was carried over, if the deposit had been made before that check was drawn it would have been entered on an earlier page.

Q. There is an intervening balancing of the check book?

A. Yes, sir.

Q. And that indicates to your mind that that check was drawn before the deposit was made?

A. Yes, sir.

I should naturally infer that that deposit would appear on the other page if it was made before that check was drawn.

Q. What checks appear to have been drawn on the 18th of May?

A. May 18th, bills payable, note, Cooper, Hewitt & Company, $10,015.38; same date, shipment per Pathfinder, $9.78, Titans & Bealing; on same day, N. Y. Kerosene Oil Co., H. Barber, cartage on copperas, $25.50; account N. Y. K. Oil Co., for Turnbull, McBain & Co., $155.85; same date, N. Y. K. Oil Co., to T. Merrifield & Co., $1,500; same date N. Y. K. Oil Co., J. F. Waller, to pay men, $1,250; same day, Stone, Nichols & Stone, $15,000; same day, Aymar & Co., loan of May 11th, $10,000, 7 days int., $13.61; total $10,013.61. That is all on the 18th.

228 Q. Leaving a balance in bank at the end of the day of $1,048.25.

A. Yes sir.

Q Now state what checks were drawn on the 22d June, 1867.

A. June 22d, 1867, N. Y. Kerosene Oil Co., W. D. Cozzens, paid W. H. & A. W. Allen, $95; same day, A. M. Cozzens, $100; same date, L. F. Mack & Co., loan of $800, and 1 day's interest, 16 cents, making $800 16; same day, Edward Cozzens & Co., $1,000; same day, N. Y. K. Oil Co., Le Compt & Perkins, $1,640; same day, Francis Skiddy, loan of 19th inst., $10,000, and 3 days' interest, $5.83, making $10,005.83; same day, N. Y. K. Oil Co., Watson, Densmore & Co., on account, $3,000; same day, Aymar & Co., loan, 19th, $10,000, and 3 days' interest, $5.83, making $10,005.83; same day, A. M. Cozzens, self, $50; leaving a balance in bank at the end of the day of $63.48.

Q. Mr. Marden, so far as you made your original entries in the register, which are exhibited on Exhibits L and M, you made them up from the contracts?

A. Yes, sir; that is the universal way.

Q. So far as you made them?

A. So far as I made them.

Q. As to the entries in the register made by Mr. Rossiter, before your time, you had nothing to do with making them?

A. Nothing.

Q. Nothing to do with the transaction?

A. Nothing.

Q. You have access to the check book; have you not?

A. Yes, sir.

Q. As the keeper of this register?

A. Yes, sir. I would like to qualify my answer. It is not my custom to refer to the check book in entering up the register. I refer to

229 the check book at the close of the day when I write up my cash book.

Q. In making the register it is not your custom to refer to the check-book?

A. It is not my custom to refer to the check-book.

Redirect:

Q. The checks drawn by Cozzens & Co. in February, May, and June, 1867, and during all the period between February and July, 1867, are drawn indiscriminately for the account of the Kerosene Oil Company, and other accounts, were they not?

A. Yes.

Q. Do you find checks drawn repeatedly to pay drafts of Gibbs, superintendent?

A. I do.

By Mr. CHOATE:

Q. You find such checks?

A. Yes, sir.

By Mr. BUTLER:

Q. What is the total amount of drafts of Gibbs, superintendent, paid by Cozzens & Co., between February 1st and July 1st, 1867, as entered in the account in the ledger of the Kerosene Oil Co.?

A. $93,132.60.

Q. All paid by checks of Cozzens & Co. upon their general bank account?

A. Yes, sir.

Q. And these checks to pay drafts of Gibbs, superintendent, are only a portion of the checks drawn during the same period to pay expenses of the Kerosene Oil Co.?

A. Yes, sir.

Adjourned to Thursday, February 13, 1873, at 11 o'clock.

February 13, 1873. Adjourned to Monday, February 17, 1873, at 11 a. m.

230 Hearing resumed February 19th, 1873.

JOHN W. MARDEN recalled for defendant.

Examined by Mr. BUTLER:

Q. Mr. Marden, you stated at the last meeting that the balance due from the Kerosene Oil Company to Cozzens & Company, on the 31st day of January, 1867, according to the account in the books, was $91,000. Have you examined and can you now state the amount of the balance in favor of Cozzens & Company against the Kerosene Oil Company on the evening of 14th February, 1867?

(Same objection.)

A. I made such an examination and am prepared to state.

Q. Please state how the account stood at the close of February 14, 1867.

A. On the books of the Kerosene Oil Company the balance to Cozzens & Company, if posted up, would have been $95,970$\frac{88}{100}$, credit balance, exclusive of interest.

By Mr. CHOATE:

Q. Exclusive of interest since the end of the following month?

A. Yes, sir.

By Mr. BUTLER:

Q. Exclusive of interest on the old balance from January 31st?

A. Yes, sir.

CHARLES JONES was then called on behalf of defendant, and being examined by Mr. Butler testified as follows:

Q. Mr. Jones, the legal title of the real estate of the Kerosene Oil Company covered by the mortgage in question in this suit is still in you as assignee in bankruptcy, is it not?

A. Yes, sir.

Q. Aside from the mortgage which is in dispute, is there any incumbrance upon the property so far as you know?

231 A. Not so far as I know.

Q. None has been credited by you as assignee in bankruptcy?

A. No.

Q. Please state what disposition has been made of the proceeds of sale of such portion of the property as was claimed by the New York Guaranty and Indemnity Company to be affixed to the freehold, but sold by you as assignee, if any?

A. I do not now recollect that I sold anything claimed to be affixed. I did advertise but I was enjoined, and I think that injunction was never argued, and we did not make any sale. We did not carry out that sale.

Q. According to your recollection, then, nothing has been sold which the defendant claimed to be attached to the freehold?

A. I think not, unless for payment of a tax. There may have been something sold by the tax collector. That is my present recollection.

Q. To what extent have claims of creditors in bankruptcy been contested by you?

(Objected to.)

A. No examination of the claims has been made. I did not think it necessary to have any examination until it was ascertained whether there would be any proceeds of the estate for distribution. I think there are general objections filed by creditors. I should be compelled to have an investigation when it comes in course of time of importance.

Q. Do I then understand that so far as your action as assignee is concerned, in reference to claims presented against the estate, the question whether you will contest them or not is in abeyance until the determination of the claim of the New York Guaranty and Indemnity Company as mortgagees?

A. Yes.

Q. It is in evidence, since your examination in this case, that none of the persons mentioned in the schedule of creditors annexed to the

232 petition in bankruptcy or of the claims of such creditors appear on the books of the Kerosene Oil Company. Please state whether or not you were aware of that fact when the bill in this suit was filed?

(Objected to.)

A. I was not; I had made no examination of the books on that subject.

Q. Assuming that to be a fact, no action has been taken by you on the basis of such fact?

(Objected to.)

A. No action whatever.

Q. And, as I understand your evidence, as yet you are not precluded as assignee from objecting to any of the claims which have been presented?

A. Not all. On the other hand it will be my duty to have an investigation in reference to the claims before any distribution is made.

Q. And so far as you are concerned there has been no discrimination thus far in favor of any one of the creditors standing in the same position in respect to their claims not appearing on the books of the Kerosene Oil Company?

A. None.

Q. And in making this answer you do not consider that the filing of this bill against the New York Guaranty and Indemnity Company was such a discrimination?

A. No; I do not.

Q. Can you state whether there are any, and if any, what claims of

creditors against the New York Kerosene Oil Company which have been presented in bankruptcy, and which are not the subject of dispute either by you as assignee, or by other creditors?

A. I cannot. The objections are on file with the register.

Cross-examined by Mr. CHOATE:

Q. The proofs that have been taken thus far of claims are merely the formal proofs required under the bankruptcy laws?

233 A. That is all.

Q. And as to the whole, or greater part of them, there are objections on file?

A. That is my present recollection.

(Defendant's counsel then put in evidence an exemplified copy of the consent of stockholders to the mortgage by the Kerosene Oil Company, which was marked Defendant's Ex. N, February 19, 1873, W. H. P.)

It was admitted that by a mistake in copying the description from the deed to the Kerosene Oil Company into the mortgage in question, the words "thence northwardly along Newtown Creek" were omitted after the words "Newtown Creek," and before the words "327 feet and 9 inches," in the description of the first parcel described in the mortgage.

Defendant rests.

The complainant reads from the minutes of the Kerosene Oil Company the record of a meeting of the trustees on the 10th of May, 1861, as follows:

At a meeting of the trustees of the New York Kerosene C[illegible]ompany held this day at the office of the company, the following gentlemen were present, viz: W. H. Appleton, J. A. Appleton, A. S. Hewitt. A quorum not being present, the meeting was adjourned to 10th June next.

G. W. AUSTIN, *Secretary.*

(Objected to.)

Also the next following entry in the book of minutes. Record of a meeting of the trustees of the New York Kerosene Oil Company, dated June 10, 1861, as follows:

At a meeting of the trustees of the New York Kerosene Oil Company held this day at the office of the company, the following gentlemen were present, viz: Edward Cooper, A. M. Cozzens, A. S. Hewitt, Eli

234 Kelly, John A. Appleton. The minutes of the last meeting were read and approved. (Other business being recorded.)

G. W. AUSTIN, *Secretary.*

JAMES P. WALLACE was here recalled by the complainant

Examined by Mr. CHOATE:

Q. I understood you to state in your former examination that at the time of the original loan of $50,000, Mr. A. M. Cozzens signed one of the contracts such as were afterwards given upon the renewal, and some of which have been produced. On looking at the entries in the register, February 15 and April 16, 1867, are you able to say whether this was signed by A. M. Cozzens or Cozzens & Company?

A. (Witness looking at papers.) I am not able to say positively in the absence of having the agreement before me, but judging from the

manner in which the books were kept it seems probable that it was signed Cozzens & Company.

Q. Have you any doubt that it was signed either Cozzens & Company or A. M. Cozzens?

A. No.

(The complainant's counsel states, and defendant's counsel allows the statement as evidence, that a search has been made among the books and papers of Cozzens & Company for the original agreements, and they have not been found.)

Q. If the original agreement was signed A. M. Cozzens, can you account in any way from the mode in which business was done in your office for the entry in the register being Cozzens & Company.

A. No, sir; unless the fact, that A. M. Cozzens represented both, and the treasurer in drawing the check might possibly have made it to Cozzens & Company, and the entries in the book might follow the check.

235 Q. But we know, do we not, the fact to be, that the treasurer made the check to Cozzens & Company?

A. Yes, sir.

Q. You say that the treasurer may have made that check?

A. Well, it was not the treasurer's duty to make the check to Cozzens & Company. I say, he may have made it that way, on account of his knowledge of Cozzens representing both parties, supposing that was the right way to make it.

Q. When you speak of "it," you mean the contract or the check?

A. The check.

Q. But one man made the check, and another man made the contract?

A. Well, in the absence of the contract, I am unable to say who did fill in the contract.

Q. The treasurer, who drew the check, may also have drawn the contract?

A. He may have drawn the contract.

Q. You would expect the register to follow the contract, as a general thing?

A. Yes, sir.

Cross-examined by Mr. BUTLER:

Q. By your answers to these questions, do you intend to qualify in any way your previous evidence, that in the transaction you relied upon the security of the mortgage to be executed?

A. I do not intend to qualify that.

Q. Can you explain how it came about, if there was any change in the entry from Cozzens & Company to A. M. Cozzens in the register?

A. At the time the mortgage was brought to us, with Mr. Butler's approval, and the first endorsement was made on the bond—that is, May 11th—after consultation with Mr. Henry, we decided to have

236 Mr. Cozzens give us the name A. M. Cozzens on those agreements, for the reason that the bond had that name, and the bond was secured by the mortgage.

Redirect by Mr. CHOATE:

Q. But I do not understand you that the original had the name of Cozzens & Co., and not the name of A. M. Cozzens.

A. I am inclined to believe that the original did have the name of Cozzens & Company.

Q. Do you recollect such fact as a matter of memory?

A. I recollect this—it bears upon it—that when the endorsement was made upon the bond, Mr. Cozzens offered to sign either for the Kerosene Oil Company or Cozzens & Company, (Mr. Choate objected to witness stating what Mr. Cozzens said) or A. M. Cozzens. Mr. Henry and I consulted which we would take, and we concluded to take A. M. Cozzens, as that was the name signed to the bond.

Q. But as a matter of recollection, you are not able to say that you do recollect whether the original agreement was signed Cozzens & Company or A. M. Cozzens?

A. I believe it was signed Cozzens & Company. I am influenced in that way by the entries.

Q. But as a matter of recollection, do you remember which it was?

A. Not as separate from the entries, which incline my belief.

(Complainant's counsel here read in evidence the record from the minutes of the meeting of stockholders of the Kerosene Oil Company, June 11, 1868.)

Defendant admits that James E. Kelly, if recalled by complainant, would testify as follows (but objects to the relevancy or competency of the evidence):

"I am executor of my father, Eli Kelly, and as his executor, became the holder of 2 certificates of stock of the New York Kerosene Oil
237 Company, in the name of A. M. Cozzens, No. 22, for 175 shares, and No. 23, 315 shares, both transferred in blank, November 16, 1860, by A. M. Cozzens. My father, Eli Kelly, died in August, 1867, and I qualified as executor very soon after, and have ever since held these certificates. They were held by my father as collateral security for a debt of A. M. Cozzens, for the balance of which he gave a note, dated November 30, 1865, which I also hold as executor, the amount of the note being $10,000, and it refers to these 490 shares of stock as collateral security."

Complainant's counsel admits that no part of this stock last referred to by Mr. Kelly was ever transferred on the books of the company, or ever sold to satisfy the debt for which it was held as collateral, and that it appears on the books of the Kerosene Oil Company as stock standing in the name of A. M. Cozzens, the same as all the other stock standing in his name.

JOHN W. MARDEN, recalled by Mr. Choate, for complainant.

Q. Please state from the books of the Kerosene Oil Company the amount of the receipts of Cozzens & Company on account of the Kerosene Oil Company during the first six months of the year 1867.

A. In January, 1867, from sales of oil	$145,770 11
From other sources in January	1,798 51
In February, from sales of oil	113,025 63
Other sources	3,802 26
In March, from sales of oil	129,490 47
Other sources	4,094 55
In April, from sales of oil	195,974 90
Other sources	5,068 61
In May, from sales of oil	68,459 79
Other sources	5,442 46
In June, from sales of oil	27,354 21
Other sources	5,963 11

238 Q. Give the same items for the months of July and August, 1867.

A. In July, from sales of oil	$133,408 87
Other sources	822 05
In August sales	170,509 92
Other sources	4,035 98

Cross-examined by Mr. BUTLER:

Q. What is the aggregate, Mr. Marden, of these receipts?

A. $1,014,751 $\frac{43}{100}$.

Q. These several items went into and constitute the debit side of Cozzens & Company's account with the Kerosene Oil Company, did they not, for the month' specified?

A. Yes, sir.

Q. And are all duly entered in the account?

A. Yes, sir.

Q. As of the last day of each month?

A. Of each month respectively.

Q. Now please state the corresponding monthly credits of disbursements made by Cozzens & Company during the same period.

A. In January, 1867, by sundry disbursements	$68,702 53
By commission and guaranty	10,932 75
By interest	904 40
In February, 1867, by sundry disbursements	134,980 58
By commission and guaranty	8,476 95
By interest	849 20
In March, by sundry disbursements	144,002 91
By commission and guaranty	9,711 75
By interest	1,127 90
In April, by sundry disbursements	176,826 88
By commission and guaranty	14,698 12
By interest	2,182 59
In May, by sundry disbursements	46,833 35
By commission and guaranty	5,134 48
By interest	733 09
239 In June, by sundry disbursements	47,867 05
By commission and guaranty	2,051 56
By interest	707 88
In July, by sundry disbursements	93,246 29
By commission and guaranty	10,005 66
By interest	862 69
In August, by sundry disbursements	149,276 52
By commission and guaranty	12,788 24
By interest	711 14
Amounting in the aggregate to	$943,614 51

Q. Now, please state what was the difference in the aggregate balance of account due from the Kerosene Oil Company to Cozzens & Company, as appearing by the books, between the 1st of January, 1867, and the 31st of August, 1867. I want you to state the balance on the first of January and the balance on the 31st of August?

A. The balance to the credit of Cozzens & Company, on the kerosene oil books, January 1st, 1867, was $158,201.80. The balance to the credit of Cozzens & Company, August 31st, 1867, was $87,064.88.

Q. And the difference being $71,136.92, is the exact difference be-

tween the aggregate proceeds of sales of oil and other items of credit, and the aggregate of the disbursements, commissions, and interest, during the same period?

A. Yes, sir.

Q. And this corresponds with the statements of the ledger balances, already in evidence?

A. That corresponds with the balance sheets of September 1st, 1867.

Q. And these several ledger balances that are in evidence show the state of the account at the end of each month as to the aggregate balance?

The defendant reads in evidence the entry relating to the charge of the bill of Barney, Butler & Parsons; and the complainant puts
240 in the testimony of Thomas M. Cozzens, taken provisionally, in relation to the same subject.

It was admitted by complainant's counsel that the book of minutes shows no resolution or by-laws relating to the number of trustees required to constitute a quorum, except that which was read from a record of the meeting of trustees held July 20, 1860, already put in evidence by defendants.

It was admitted by defendant's counsel that it appears on the minutes that no meeting of trustees, at which less than four are recorded as being present, was held, except that of May 10, 1861, already put in by complainant, and that of March 8, 1867, also put in by complainant.

It was admitted by the complainant that there was no entry in the book of minutes of the election of any secretary of the company after the election of George W. Austin at the meeting held July 21, 1864.

It was also admitted by the defendant's counsel that George W. Austin continued to sign the minutes as secretary, and they are in his handwriting down to and including the meeting of March 9, 1867, already put in evidence.

It was also admitted that the record of the meeting of stockholders on the 28th of March, 1868, which has been put in evidence by the defendant, is in the handwriting of Jordan M. Fowler, and signed by him as secretary, and that all the subsequent entries in the minute-book being meeting of trustees on 31st March, 1868, and 21st April, 1868, and of the meeting of the stockholders on the 11th of June, 1868, was in the handwriting of and signed "Jordan M. Fowler, secretary." But there is no entry of his election as secretary, and no entry on the subject, except an entry in the record of meeting of trustees of the 31st March, 1868, as follows:

241 "And on motion Jordan M. Fowler was continued secretary for the balance of the year."

Any part of the book of minutes may be referred to by either party in the argument. See book of minutes at end of exhibits.

Testimony closed.

COMPLAINANT'S EXHIBITS.

Complainant's Exhibit A, January 22, 1873.

We, the undersigned, desiring to form a company for the purposes hereinafter mentioned under the authority and in pursuance of the act of the legislature of the State of New York, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical,

or chemical purposes," passed February 17, 1848, and the act or acts amendatory thereof or in addition thereto, and to accomplish the formation of such company, do make, sign, and acknowledge this certificate, and we do hereby state:

First. That the corporate name of said company is "The New York Kerosene Oil Company."

Second. That the objects for which said company is formed are the manufacturing of oil, gas, or other burning or lubricating fluids or materials from coal, asphaltum, asphalt rock, petroleum, or other substances, and the sale of the products of such manufacture.

Third. That the capital stock of said company is five hundred thousand dollars, consisting of five thousand shares of one hundred dollars each, and the term of the existence of said company is to be fifty years.

Fourth. That the number of the trustees of said company is six, and the names of the trustees who shall manage the concerns of said company for the first year are William H. Appleton, Abraham M.
242 Cozzens, Eli Kelly, Edward Cooper, Abram S. Hewitt, and John A. Appleton.

Fifth. That the operations of said company are to be carried on in the town of Newtown, in the county of Queens, and State of New York.

In witness whereof we have hereunto set our hands and seals the twenty-fourth day of May, in the year eighteen hundred and sixty.

EDWARD COOPER. [L. S.]
A. M. COZZENS. [L. S.]
ELI KELLY. [L. S.]
WM. H. APPLETON. [L. S.]
ABRAM S. HEWITT. [L. S.]
JOHN A. APPLETON. [L. S.]

STATE OF NEW YORK,
City and County of New York:

On the 25th day of May, A. D. 1860, before me came Abram M. Cozzens and Eli Kelly, to me known to be two of the individuals described in and who executed the foregoing certificate, and severally acknowledged that they had executed the same, and on the 26th day of May, 1860, before me came William H. Appleton, Abram S. Hewitt, Edward Cooper, and John A. Appleton, to me known to be the other four of the individuals described in and who executed said certificate, and severally acknowledged that they had executed the same.

EDWIN M. DANIEL,
Commissioner of Deeds.

QUEENS COUNTY,
Clerk's Office, ss:

I, John H. Sutphin, clerk of the county of Queens, do hereby certify that I have compared the foregoing with the original, as the same was filed in this office on the 30th of May, 1860, and that the same is a true and correct copy thereof and the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said county the 7th day of January, A. D. 1873.

J. H. SUTPHIN.

243 (Endorsed:) Copy certificate of incorporation of "The New York Kerosene Oil Company."

Complainant's Exhibit B, Jan. 22d, '73.

Plaintiff's Exhibit B was the petition in bankruptcy filed 15th June, 1868, by the New York Kerosene Oil Company, in the usual form, with an authenticated copy of the vote of the stockholders in the form required by law, authorizing the proceeding. The schedules attached are as follows:

Schedule A, No. 1, contained a statement of all the creditors entitled to priority under § 28 of the bankruptcy act.

Schedule A, No. 2, is as follows:

	Names of cred ors.	Residences and description.	When and where contracted.	Value of securities.	Amount of debts.
	Edward A. Quintard, Herbert Ward, and William W. Skiddy.	City of New York, composing firm of Quintard, Ward & Co.	Claim against petitioner for coal alleged to have been sold and delivered by claimants to petitioner at the city of New York in October and November, 1867, which claim is denied by petitioner; the coal referred to having been purchased from said Quintard, Ward & Co. by the firm of Cozzens & Co., and paid for in the notes of Cozzens & Co., given to, and except so far as paid, now held by said Quintard, Ward & Co.; said coal also having been sold and delivered by said Cozzens & Co. to petitioner, and paid for on account.	Unknown.	$16,259 33
	—— Colwell and —— Colwell.....	City of New York, composing the firm of Colwell & Brother.	Claim for repairs of boats, &c., August to November, 1867, which petitioner alleges to have been paid to said Colwell & Brother, in the notes of said Cozzens & Co. held by claimants.	Unknown.	5,056 53
	Joseph Lecomte and George H. Perkins.	City of New York, composing firm of Lecompte & Perkins.	Claim for tin cans, in or about December, 1867, which petitioner alleges to have been paid in notes of Cozzens & Co., given to and held by claimants.	Unknown.	2,860
	Truman Merrifield	City of New York.....	Claim for tin cans, in or about December, 1867, which petitioner alleges to have been paid in notes of Cozzens & Co., given to and held by claimant.	Unknown.	1,480
245	Edward Cooper and Abraham S. Hewitt.	City of New York.....	Cash loaned in January, 1867, at the city of New York, by president of petitioner, and secured by draft of petitioner, dated 15th April, 1867, payable eighty days after date, upon and accepted by Cozzens & Co., due July 7, 1867, given to and now held by said Cooper & Hewitt.	Unknown.	10,203
	William H. Appleton.....	City of New York.....	Cash paid 25th January, 10th February, and 3d and 14th March, 1868, at the city of New York, by said W. H. Appleton, to take up the following notes, endorsed by him for the accommodation of petitioner, namely, four notes made by Cozzens & Co., to the order of A. M. Cozzens, president, endorsed A. M. Cozzens, president N. Y. K. Oil Co., and afterwards endorsed by said William H. Appleton, one dated 22d October, 1867, payable 3 months after date, due 25th January, 1868, for $5,000; one dated 7th November, 1867, payable 3 months after date, due 10th February, 1868, for $10,000; one dated 30th October, 1867, payable 4 months after date, due 3d March, 1868, for $30,000; one dated 11th November, 1867, payable 4 months after date, due 14th March, 1868, for $15,000; which notes were taken up at maturity, and are now held as security by said Appleton.	Unknown.	60,000
246	Tremont National Bank	Boston, Massachusetts.....	Cash loaned in January, 1868, at Boston aforesaid, by said bank, to Abraham M. Cozzens, then president of petitioner, upon discount of a note, made by said Cozzens & Co. to the order of A. M. Cozzens, president, and endorsed A. M. Cozzens, president N. Y. K.	Unknown	10,000

JOHN PERKINS, *Treas'r of Petitioner.*

Schedule A, No. 2.—Continued.

Names of creditors.	Residences and description.	When and where contracted.	Value of securities.	Amount of debts.
		Oil Co., dated 15th January, 1868, payable 3 months after date, due 18th April, 1868, and now held by said bank.		
Martin Kalbfleisch, Albert M. Kalbfleisch, Frederick W. Kalbfleisch, Franklin H Kalbfleisch, & Charles H. Kalbfleisch.	Brooklyn, Kings Co, New York, composing the firm of Martin Kalbfleisch & Sons.	Claim for chemicals, November and December, 1867, and January, 1868, which petitioner alleges has been paid in notes of Cozzens & Co, given to and held by claimants.	Unknown.	3,930 89
Henry L. Pierson, Henry L. Pierson, jr., Daniel L. Winchester, & J. Fred. Pierson.	City of New York, composing the firm of Pierson & Co.	Claim for iron, about November, 1867, which petitioner alleges has been paid in note of Cozzens & Co., given to and held by claimants.	Unknown.	3,153 42
Francis W. Leggett, George F. Leggett, & Charles Williams.	City of New York, composing the firm of F. W. & G. F. Leggett.	Claim for glue, about November, 1867, which petitioner alleges has been paid in note of Cozzens & Co., given to and held by claimants.	Unknown.	2,242 90
W. W. Ballard and ——	Elmira, Chemung Co., N. Y., composing the firm of W. W. Ballard & Co.	Claim for shooks, November and December, 1867, January, 1868, which petitioner alleges has been paid in acceptances or notes of Cozzens & Co., given to and held or used by claimants.	Unknown.	11,400 50
Isaac K. Roberts.....	City of New York	For repairs of steamboat Belle, made in October, 1867, by John T. Durkin, secured by attachment therefor on said boat—debt and security assigned to Isaac K. Roberts; amount of debt secured, besides costs and interest.	$844 66	844 66
247				
Metropolitan National Bank.	City of New York	Cash loaned in January, 1868, at the city of New York, by said bank, to Abraham M. Cozzens, then president of petitioner, upon discount of two drafts, drawn by Cozzens & Co., to their own order, and endorsed by them upon, and accepted by Bursley & King, of the city of New York, and endorsed A. M. Cozzens, president N. Y. K. Oil Co, namely, one dated 7th January, 1868, payable 20 days after date, due 30th January, 1868, for $13,500; one dated 24th January, 1868, payable 30 days after date, due 26th February, 1868, for $13 500, and which drafts, so accepted, are now held by said bank. Said Bursley & King, also hold storage receipt, signed by A. M. Cozzens, president of petitioner, for 2,500 barrels refined petroleum, dated 2d December, 1867, which they claim to be a security for the above acceptances. Petitioner denies all liability thereon.	Unknown.	27,000
Marshall O. Roberts.....	City of New York.....	Claim for cash, paid by him at the city of New York, on or about 26th March, 1868, to take up a certain promissory note, endorsed by him for the accommodation of Abraham M. Cozzens and Thomas M. Cozzens, which note was made by them under their firm of Cozzens & Co, dated 24th December, 1867, and for $10,000, payable ninety days after the date thereof, to the order of A. M. Cozzens, president, and by him endorsed, which note was taken up by said Roberts, at or after the maturity thereof, and is now held by him. Petitioner denies all liability upon said note, or for said payment. Said Roberts, also claims to hold, as further secu-	Unknown.	$10,000
248				

		rity for said payment, a mortgage upon the steamboat Belle, made to him by said Abraham M. Cozzens and Thomas M. Cozzens, in whose names said steamboat was enrolled, although it was in fact owned by petitioner, and petitioner maintains that said mortgage is void.		
New York Guaranty and Indemnity Company.	City of New York	Claim for money loaned by said Guaranty Company, to Abraham M. Cozzens, namely, $50,000, on or about 15th February, 1867; $25,000, on or about 18th May, 1867, and $25,000, on or about 22d June, 1867, in all $100,000. As security for which amount the said Guaranty Company holds the bond of said Abraham M. Cozzens, dated 29th April, 1867; also, a mortgage of same date, executed by said Abraham M. Cozzens, in the name of petitioner, to the said New York Guaranty and Indemnity Company, upon all the real estate of petitioner, situate in Newtown, Queens County, New York, and recorded in Queens County clerk's office, in liber 159 of mortgages, page 400, on the 11th day of May, 1867; also, two notes made by said Abraham M. Cozzens, in the name of petitioner, one dated 20th June, 1867, for $25,000, the other dated 13th July, 1867, for $50,000, each payable sixty days after date, to the order of, and endorsed by Cozzens & Co.; also, a storage receipt, signed by said Abraham M. Cozzens, in the name of petitioner, for 10,000 barrels, of 40 gallons each, of crude petroleum oil, in bulk, in tanks. And petitioner denies the validity of each and all the said pretended securities, and denies that petitioner, or the property of petitioner, is liable to the said Guaranty and Indemnity Company, in any manner, or to any extent, for the above-mentioned loans.	$100,000	$100,000
249				
Christian Bors	City of New York	Claim contracted at the city of New York, on 14th January, 1867, upon a storage receipt, given by Abraham M. Cozzens, in the name of petitioner, for 2,000 barrels of refined petroleum, upon the security of which said Bors loaned to Cozzens & Co., $12,000. Petitioner denies any and all liability in respect of this transaction.		
250				
Ayman & Co	City of New York	Claim contracted at the city of New York, on 9th December, 1867, upon a storage receipt, given by Abraham M. Cozzens, in the name of petitioner, for 2,500 barrels of refined petroleum, upon the security of which said Bors loaned to Cozzens & Co., $10,000, which has been reduced to $5,016. Petitioner denies any and all liability in respect of this transaction.		

JOHN PERKINS, *Treasr of Petitioner.*

Schedule A, No. 3, is as follows:

251 *Schedule A, No. 3.—Creditors whose claims are unsecured.*

Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint contractor with any other person; and, if so, with whom.
Joseph Nason Henry Worthington (Composing firm of Joseph Mason & Co.)	New York City. Irvington, New York Merchants	$34 06	N. Y. City, December 5, 1867	The price of goods purchased be petitioner.
Henry Solms	Residence unknown; box manufacturer.	1,671 01	N. Y. City, January, 1868	Same as above.
William R. Renwick, doing business under firm of Battelle & Renwick.	New York City; merchants; agents White Lead Co.	161 92	N. Y. City, January 8, 1868	Do.
Benjamin Tatham Charles B. Tatham George N. Tatham William P. Tatham Henty B. Tatham (Composing the firm of Tatham & Brothers.)	New York City Brooklyn, N. Y. Philadelphia " " Merchants and manufacturers, doing business in N. Y. City.	49 28	N. Y. City, January 2, 1868	Do.
Jonh Decoudres John Fullerton (Composing the firm of Decoudres & Fullerton.)	Brooklyn, N. Y. do. Brass founders	3 38	N. Y. City, August and November, 1867.	Do.
252 New York Belting & Packing Company.	New York City; rubber manufacturers.	$0 90	N. Y. City, January 28, 1868.	The price of goods purchased by petitioner.
Francis P. Furnald Francis P. Furnald, jr. Remick W. Champion Isaac N. Davies (Composing the firm of Furnalds, Champion & Co.)	New York City Residence unknown Brooklyn, N. Y Jersey City, N. J. Brush manufacturers, doing business in N. Y. City.	13 50	N. Y. City, January 9, 1868	Do.
Daniel F. Tiemann Julius W. Tiemann Peter C. Tiemann (Composing the firm of D. F. Tiemann & Co.)	New York City do. do. Dealers in paints in New York City.	70	N. Y. City, January 13 and 27, 1868.	Do.
W. D. Gardner	Merchant; residence unknown	53 70	N. Y. City, January 11, 1868	Do.
Henry R. Worthington	Res. Irvington N. Y.; Pump manufacturer, N. Y. City.	20 50	N. Y. City, January 20 and 28, 1868.	Do.
New York Fire Brick Company	N. Y. City; brick manufacturers	36	N. Y. City, January 27, 1868	Do.
Peter Beckel	Residence unknown; wheelwright	105 97	Q's Co., Nov. & Dec. '67, and Jan. '68.	The price of work and services for petitioner.
Carl Kister	Residence unknown; blacksmith	74 59	Queens Co., January, 1868	The price of goods, work, and labor for petitioner.

JOHN PERKINS, *Treas'r of Petitioner.*

253 F. J. Wilson	Residence unknown, veterinary surgeon.	$42 50	Newton, Queens Co., Feb. to July, 1867.	The price of services rendered petitioner.
The firm of Morris Tasker & Co., whose individual names are unknown to petitioner.	Residences unknown, manufacturers, doing business in Philadelphia, Penn.	367 56	N. Y. City, Nov. & Dec., 1867.	The price of goods purchased by petitioner.
Martin Kalbfleisch	Brooklyn, N. Y.			
Fred'r'ck W. Kalbfleisch	do.			
Charles H. Kalbfleisch	New York City			
Albert M. Kalbfleisch	Brooklyn, N. Y	1 519 96	N. Y. City, Jan., 1868	do.
Franklin H. Kalbfleisch	do.			
(Composing the firm of Martin Kalbfleish & Sons.)	Merchants and manufacturers			
Owners of the propeller Henry L. Wait, whose names are unknown to petitioner.		8	N. Y. City, Jan. 24, 1868	The price of services rendered petitioner.
Theodore Mace	Sing Sing, N. Y.			
John C. McCarty	Brooklyn, N. Y	34 32	N. Y. City., Dec. 3 and 31. 1867.	The price of goods purchased by petitioner.
(Composing the firm of Theodore Mace Co.)	Merchants doing business in N. Y. City.			
American Screw Company	Providence, R. I., manufacturers	4 32	N. Y. City, Oct. and Dec., 1867.	do.
Henry L. Pierson	New York City			
Henry L. Pierson, jr	do.			
254 John F. Pierson	New York City	$217 44	N. Y. City, Jan. 6 and 13, 1868.	The price of goods purchased by petitioner.
Daniel L. Winchester	Brooklyn, N. Y			
(Composing the firm of Piersons & Co.)	Merchants doing business in New York City.			
Henry Spear	Residence unknown, stationer, doing business in New York City.	22 70	N. Y. City, Jan., 1868	do.
John Eichenger	Residence unknown, harness-maker	30 40	Greenpoint, Kings Co., Sept., 1867, to Jan,, 1868, inc.	The price of goods purchased for petitioner.
John J. Rockwell	Brooklyn, N. Y			
Walter Scott	Residence unknown	60	N. Y. City, Dec. 19, 1867	The price of goods purchased for petitioner.
George Hartwell	Residence unknown			
(Composing the firm of Rockwell & Scott.)				
James Buchan	New York City			
Robert C. Buchan	do.	69 46	N. Y. City, Dec. 27, 1867	do.
(Composing the firm of James Buchan & Co.)	Merchants			
Dudley B. Fuller	New York City			
George Fuller	Residence unknown			
Horace W. Fuller	New York City			
Charles D. Fuller	do.	212 10	N. Y. City, Oct. 30, 1867	do.
James C. Lord	do.			
Edward C. Lord	do.			
(Composing the firm of Fuller, Lord & Co.)	Merch'ts & m'f'rs, doing business in N. Y. City.			
255 T. F. Rowland	Residence unknown, iron manufacturer.	$13 00	Greenpoint, Kings Co., June 28 and Aug. 5, 1867.	The price of work and labor for petitioner.

Schedule A, No. 3.—Creditors whose claims are unsecured.

Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange promissory note, &c., and whether contracted, as co-partner or joint contractor with any other person; and, if so, with whom.
James Murphy	New York City	11 05	N. Y. City, Sept., 1867, and Jan., 1868.	The price of goods purchased for petitioner.
William J. Pease	do.			
William P. Buckmaster	do.			
(Composing the firm of James Murphy & Co.)	Iron-founders			
John H. Macy	New York City	12 00	N. Y. City, Dec. 16, 1867	The price of work and labor for petitioner.
Francis H. Macy	do.			
Sylvanus J. Macy	do.			
William H. Macy, jr	do.			
Josiah Macy, jr	do.			
(Composing the firm of Josiah Macy's Sons.)	Merchants			
James Gilmour	Brooklyn, N. Y	98 10	N. Y. City, Jan. 20, 1868	do.
James A. McBain	do.			
Amos T. Burt	Residence unknown			
(Composing the firm of Gilmour, McBain, & Co.)	Lighters, office in New York City			
Joseph Lecompte	Brooklyn, N. Y	3,796 21	N. Y. City, Dec., 1867, and Jan., 1868.	The price of goods purchased for petitioner.
George H. Perkins	do.			
(Composing the firm of Lecompte & Perkins.)	Can-makers, New York City			
Smith	Residence unknown	2,400	N. Y. City, Jan., 1868	The price of goods purchased for petitioner.
Henry C. Ohlen	do.			
256 (Composing the firm of Smith & Ohlen.)	Brokers, doing business in New York City.			
Milton C. Egbert	Residence unknown	7,678 34	New York City	The price of crude petroleum purchased by the firm of Cozzens & Co., and which petitioner claims was sold by said Egbert & Brown to said Cozzens & Co., and not to petitioner; and this claim is therefore denied to be a valid debt.
John Brown	do.			
(Composing the firm of Egbert & Brown.)	Merchants, doing business in New York City.			
Alanson T. Briggs	Residence unknown, merchant	1,070	N. Y. City, Dec. 18, 1867	The price of goods purchased for petitioner.
Weehawken Docks	Weehawken, New Jersey	1,410	November, 1867	Indebtedness for use of dock and services rendered.
W. W. Ballard and	Elmira, Chemung Co., New York			
(Composing the firm of W. W. Ballard & Co.)		2,439 77	N. Y. City, Dec., 1867, and Jan., 1868.	The price of goods purchased for petitioner.
William M. Prichard	New York City	Unknown.	New York City	Balance for professional services rendered petitioner in various suits and other matters now pending, the amount of which is unliquidated.
William G. Choate				
Duncan Smith				
(Comprising the firm of Prichard, Choate, & Smith, lawyers.)				

JOHN PERKINS, *Treas'r of Petitioner*

257 Schedule A, No. 4, is as follows:

Schedule A, No 4—Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, or acceptors.

None, unless hereinbefore stated under other heads.

JOHN PERKINS,
Treas'r of Petitioner.

Schedule A, No. 5, is as follows:

Schedule A, No. 5.—Accommodation paper.

None, unless hereinbefore stated under other heads.

JOHN PERKINS,
Treas'r of Petitioner.

Oath to Schedule A.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

On this 15th day of June, A. D. 1868, before me personally came John Perkins, of the city of New York, the treasurer of the New York Kerosene Oil Company, the petitioning debtor mentioned in, and who, by said Perkins, subscribed to the foregoing petition and schedule marked A, respectively, and said Perkins, being by me first duly sworn, did declare the said schedule to be a statement of all the debts, &c., of said corporation, in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

District Judge.

Register.
CHAS. W. NEWTON,
U. S. Commissioner.

Schedule B, No. 1, is as follows:

258 *Schedule B, No. 1.—Statement of all real and personal estate and effects whatever which are now in the possession, enjoyment, or under the control of the petitioner, or which are held by any other person in trust for his use, or to the possession or enjoyment of which he is entitled at the date of filing petition.*

INTEREST IN LANDS

Particular description of all real estate owned by petitioner or held by him, and whether under contract or lease.	Encumbrances thereon, if any, and dates thereof.	Statement of all particulars relating thereto.	Estimated value.
A parcel of land situated in the town of Newtown, Queens County, New York, together with the manufactory and other buildings thereon, conveyed to petitioner in fee by Eli Kelly, John A. Appleton and wife, Edward Cooper and wife, Abram S. Hewitt and wife, by deed dated 28th July, 1860, and recorded in the office of the clerk of Queens County aforesaid, in liber 183 of deeds, page 128, on 30th October, 1860: Also a triangular piece of land, situated at Dutch Kills, in Newton, aforesaid, on the east side of Newtown Creek, with the right to land under water adjoining the same, conveyed to petitioner in fee by deed dated 28th July, 1860, recorded in said Queens County clerk's office in liber 183 of deeds, page 265, on 8th November, 1860.	The taxes of the year 1867, as hereinbefore set forth, $1,350, affects both parcels. The mortgage hereinbefore set forth for $100,000, to the New York Guaranty and Indemnity Company, and denied by petitioner, purports to cover both these parcels of land.		Unknown.

JOHN PERKINS, *Treasr. of Petitioner.*

259 Schedule B, Nos. 2–6 contained a statement of the personal property of the bankrupt corporation, choses in action, &c., duly verified, omitted here by consent as having no bearing on the matters in controversy.

Complainant's Exhibit C, January 22d, 1873.

In the district court of the United States for the eastern district of New York.

In the matter of the New York Kerosene Oil Company, bankrupt. In bankruptcy.

At No. 141 Montague street, in the city of Brooklyn, county of Kings, in said district, on the 16th day of June, A. D. 1868. Before Mr. Ethelbert S. Mills, register in bankruptcy.

EASTERN DISTRICT OF NEW YORK, *ss:*

MEMORANDUM.—This day made adjudication of bankruptcy upon above-named debtor's petition and ordered that note of company, in accordance with form No. 3, be annexed to petition and schedule.

E. S. MILLS,
Register.

I hereby certify that the above is a true copy of the memorandum in the docket kept by me, of my proceedings in the above matter.

E. S. MILLS,
Register in Bankruptcy.

(Endorsed:) No. 380. United States district court, eastern dis-
260 trict of New York. In the matter of the New York Kerosene Oil Company, bankrupt. Memorandum from docket. E. S. Mills, register. Filed June 16th, 1868.

Complainant's Exhibit D.

In the district court of the United States for the eastern district of New York.

In the matter of the New York Kerosene Oil Company, bankrupt. In bankruptcy.

EASTERN DISTRICT OF NEW YORK, *ss:*

To Charles Jones, of Brooklyn, in the county of Kings, and State of New York.

I do hereby certify to you that you were duly appointed assignee of the estate and effects of the above-named bankrupt, at the first meeting of the creditors, on the 8th day of September, A. D. 1868, and I do hereby approve and confirm said appointment, and I do further certify that several of the creditors of said bankrupt who have proved their claims were present, or were duly represented at said meeting.

E. S. MILLS,
Register in Bankruptcy.

Dated at Brooklyn the 8th day of Sept., A. D. 1868.

To whom it may concern:

Be it known that I hereby signify my acceptance of the trust of assignee of the estate of the above-named bankrupt, this 8th day of September, A. D. 1868.

CHARLES JONES.

(Endorsed:) No. 380. United States district court, eastern district of New York. In bankruptcy. In the matter of the New York Kerosene Oil Company, bankrupt. Notification of appointment of assignee. Prichard, Choate & Smith, attorneys for petitioner.

261

Complainant's Exhibit E. January 22d, 1873.—Assignment of bankrupt's effects.

In the district court of the United States for the eastern district of New York.

In the matter of the New York Kerosene Oil Company, bankrupt. In bankruptcy.

EASTERN DISTRICT OF NEW YORK, *ss:*

Know all men by these presents that Charles Jones, of Brooklyn, in the county of Kings, and State of New York, in said district, has been duly appointed assignee in said matter.

Now, therefore, I, Ethelbert S. Mills, register in bankruptcy of said district, by virtue of the authority vested in me by the fourteenth section of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, do hereby convey and assign to the said Charles Jones, assignee as aforesaid, all the estate, real and personal, of the said The New York Kerosene Oil Company, bankrupt aforesaid, including all the property of whatever kind, of which he is possessed, or in which he was interested, or entitled to have, on the 15th day of June, A. D. one thousand eight hundred and sixty-eight, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions
262 of said fourteenth section of said act, to have and to hold all the foregoing premises to the said Charles Jones and his heirs forever. In trust nevertheless for the use and purposes, with the powers, and subject to the conditions and limitations set set forth in said act.

In witness whereof I, the said register, have hereunto set my hand and caused the seal of said court to be affixed this 8th day of September, anno Domini one thousand eight hundred and sixty-eight.

[L. S.] E. S. MILLS,
Register in Bankruptcy.

I, Samuel T. Jones, clerk of the district court of the United States for the eastern district of New York, do hereby certify that the foregoing is a true copy of the original recorded in my office.

Witness my hand and the seal of the said court this 8th day of September, A. D. 1868.

SAMUEL T. JONES, *Clerk.*

(Endorsed:) No. 380. United States district court, eastern district of New York. In bankruptcy. In the matter of the New York Kerosene Oil Company, bankrupt. Assignment of bankrupt's effects.

Exhibit L. January 24, 1873.

STATE OF NEW YORK,
City and County of New York, ss:

On this seventh day of May, in the year eighteen hundred and sixty-seven, before me personally came Abraham M. Cozzens, president, and George W. Austin, secretary of the New York Kerosene Oil Company, the corporation described in and which executed the foregoing instrument, and the said Cozzens and the said Austin being to me severally personally known, and being by me severally duly sworn, did depose and say, each for himself, that the seal affixed to the
263 foregoing instrument and opposite to which their names are respectively set is the coporate seal of the said corporation, and that the said seal was thereto affixed by the authority of said corporation, and the said Abraham M. Cozzens did further depose and say that he resides in the city of New York; that he is the president of the said The New York Kerosene Oil Company, the corporation described in and which executed the foregoing instrument, and that he subscribed his name thereto opposite to said seal by the authority of said corporation, and the said George W. Austin did further depose and say that he is the secretary of the said The New York Kerosene Oil Company, the corporation described in and which executed the foregoing instrument; that he resides at Fort Hamilton, county of Kings, and State of New York, and that he subscribed his name to said instrument, opposite to said seal, by the authority of said corporation.

T. L. OGDEN,
Notary Public, New York County.

Recorded in Queens County clerk's office in Liber 139 of mortgages, page 400, &c., May 11th, 1867, at 4 o'clock p. m.
Examined by—

JONAH T. HEGEMAN, *Clerk.*

264 *Complainant's Exhibit, Feb'y* 6, 1873.

LOSSES ON SHIPMENTS OIL.

Date of shipm't.	Ship.	No. bbls.	Invoice price.	Valuation of oil, on which 7½ per ct. com. and guar. was ch'd.	Date of charge to K. O. Co.	Amt. of loss.
Mar. 17 & 21, '65	Conquest	1,355 bbls.	60c.	$33,456 95	Oct. 23, '66	$2,683 43
Mar. 16, '66	Broome	550 "	43c.	9,559 49	April 20, '67	5,440 80
						$8,124 23

Complainant's Exhibit, Feb. 6, 1873.

LOSSES ON SHIPMENTS NAPTHA.

Date of ship'm't.	Ship.	No. bbls.	Invoice price.	Val'n of Naptha on which ½ per ct. com. and guar. was ch'd.		Date of charge to K. O. Co.	Amt. of loss.
Oct. 10, '65..	Sarah King....	1,150 bbls.	35 c.	$16, 790 58	May 25, '66	June 27, '66.....	$4, 909 57
Dec. 10, '64 .	Return	500 "	28 c.	5, 772 74	May 18, '66	"	391 59
Feb. 20, '65 .	Hudson	600 "	32 c.	7, 772 16	May 18, '66	"	2, 217 43
Oct. 21, '65 .	Amazon.....	847 "	35 c.	12, 250 04	May 18, '66	"	4, 361 41
Oct. 30, '65 .	Frey	700 "	35 c.	10, 070 55	May 18, '66	"	3, 340 14
Nov. 21, '65.	Idolique.....	300 "	35 c.	4, 321 35	May 18, '66	"	1, 651 87
Nov. 7, '66..	Viking	500 "	35 c.	7, 243 03	May 25, '66	"	2, 451 98
Dec. 31, '65 .	Sarah Ellen ...	600 "	30 c.	7, 255 35	May 9, '66	"	3, 005 08
Mar. 20. '66.	Jasen	1,120 "	25 c.	11, 509 48	Nov. 7, '66	Nov. 7. '66.....	8, 179 45
April 20. & May 2, '66...	Earl of Shaftsbury	1,271 "	17 c.	8, 917 83	Oct. 24, '66	Oct. 24.'66 2,442 53 } Mar. 8,'67 5,538 83 }	7, 981 36
265							
May 9 & 12, '66.	Mary M. Williams.	1,411 bbls.	17 c.	9, 854 90	Oct. 26, '66	Oct. 26,'66 2, 11081 } Nov. 7, '66. 5,076 76 }	7, 187 57
May 12, '66	Stella	850 "	17 c.	6, 067 47	Oct. 26, '66	Oct. 26, '66.....	4, 255 61
May 26, '66.	Perseverance..	950 "	17 c.	6, 706 61	March 8, '67	Mar. 8, '67.....	6, 480 21
Aug. 27, '66.	Rinken.....	300 "	15 c.	1, 945 65	Oct. 26, '66	Oct. 26, '66	317 09
Sept. 22, '66	Cyrene	500 "	15 c.	3, 132, 15	Feb. 19, '67	Feb. 19, '67.....	1, 877 34
Oct. 12. & Nov. 30, '66	Cumberland ...	750 "	15 c.	4, 970 58	do.	"	2, 043 64
Oct. 25, '66 .	Orion.....	518 "	15 c.	3, 315 39	do.	"	2, 112 16
Oct. 30, '66 .	Annie Sherwood.	500 "	15 c.	3, 211 65	do.	"	1, 872 08
Oct. 31, '66 .	Kathleen'.....	200 "	15 c.	1, 322 63	Mar. 19, '67	Mar. 19, '67.....	544 64
Nov. 23, '66	Rhea Silvia...	1,000 "	15 c.	6, 572 20	Mar. 25, '67	Mar. 25, '67.....	2, 470 81
April 8, '67.	Boaz	1,200 "	13 c.	7, 042 20	Nov. 30, '67	Nov. 30, '67.....	3, 141 59
April 23 & May 14, '67	Pathfinder.....	877 "	13 c.	5, 234 80	Nov. 30, '67	Nov. 30, '67.....	2, 934 68
							$73, 728 24

266 *Complainant's Exhibit Feb'y* 6, 1873.

PROFITS ON SHIPMENTS NAPTHA.

Date of ship'm't.	Ship.	No. bbls.	Invoice price.	Val'n of Naptha, on which ½ per ct. com. and guar. was ch'd.		Date of credit to K. O. Co.	Amt. of profits.
Sept. 19, '65...	Princess Royal.	880 bbls.	35 c.	$12, 659 13	April 18, '66	June 27, '66	$2, 049 19
Dec. 2, '65....	Wm. Carey.....	288 "	35 c.	4, 137 24	May 29, '66	May 29, '66	937 73
Aug. 3, '66....	Dr. Barth	500 "	15 c.	3, 210 05	April 20, '67	April 20, '67	595 52
Mar. 5, '67....	Jessie	650 "	13 c.	3, 834 09	May 22, '67	May 22, '67	1, 174 83
June 8, '67 ...	Eureka	300 "	13 c.	1, 817 69	Dec. 20, '67	Dec. 31, '67	195 02
July 24, '67 ..	Rhea.....	200 "	13 c.	1, 175 52	Dec. 20, '67	"	222 53
Aug. 20, '67 ..	Helena.....	800 "	13 c.	4, 555 70	Dec. 14, '67	"	1, 167 17
Sept. 28, '67 ..	Superb.....	500 "	15 o.	3, 284 83	Dec. 30, '67		1, 409 85
							$7, 051 84

267 DEFENDANT'S EXHIBITS.

Deft's Exhibit I.—Marked for identification January 22*d*, 1873.

[New York Guaranty and Indemnity Company. Offices No. 14 Broad street.]

FEBRUARY 15TH, 1867.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
J. J. HENRY, Esq., *President.*

DEAR SIR: It is understood that we will cause to be prepared a

mortgage on the real estate of the company on Newtown Creek, for the sum of one hundred thousand dollars in your favor, and to be held by you for the loan of fifty thousand dollars made this day, and any future loan you may make to our company.

Your obed't serv't,

A. M. COZZENS,
President N. Y. Kerosene Oil Company.

268 DEFT'S EXHIBIT NO. 1, JAN. 23D, 1873.

Dr. *Ledger balance to 1st Jan.*,1867. Cr.

C. L. Wheeler, salary acct	$165	Capital stock	$500, 00
A. M. Cozzens, do.	700	J. B. Cozzens	797 36
J. F. Waller, salary acct	125	Cozzens & Co	158, 201 80
W. D. Cozzens	80		
C. L. Wheeler, petroleum acc't	483 12		
G. C. Gibbs, sup't	66, 849 60		
Real estate, &c	350, 000		
Kerosene oils	240, 596 44		
	$658, 999 16		$658, 999 16

E. E. Jan'y 1, '68.
G. W. Austen, Sec'y.

Dr. *Statement.* Cr.

Kerosene oils as above	$240, 496 44	Stock on hand	$168, 495 77
Accounts above, chargeable	67, 332 72	G. C. Gibbs, drafts	$40, 806 00
Freight due on Dennis Run oil—		Rec'd at works to 31st Dec., 476,480 gals. at 8 cents	30, 118 40 2, 687 60
Bbls.		134 bbls. crude to arrive from Wheeler at 15 cents per gal. or $6.30 per bbl	844 20
Recd. at works to 31st Dec. 10, 972		357 shooks at $2.05 and 28 bbls. at $3.10 to arrive from Wheeler	818 65
Paid freight on 7, 892		Balance deficiency	192, 576 28
3, 080 at $3.30, 10, 164			
Unsettled bills	37, 329 34		
	$365, 422 50		$365, 422 50
269		Balance 1st January, 1867	$192, 576 28
		Add commission on naptha refunded	1, 678 65
		Antwerp's oil account	12, 323 31
			$206, 578 24
		Balance 1st November, 1866	164, 174 80
		Loss	$42, 403 44

DEF'T'S EXHIBIT NO. 2.—JAN. 23D, 1873.

DR. *Ledger balance to 1st Feb'y*, 1867. CR.

C. L. Wheeler, salary acc't	$415	Capital stock	$500, 000
A. M. Cozzens	700	J. B. Cozzens	647 36
Interest acc't	904 40	Cozzens & Co	91, 172 86
Fuels	9, 215 72		
U. S. int. revenue	298 44		
J. F. Waller	250		
W. D. Cozzens	318		
C. L. Wheeler, petroleums	552 55		
G. C. Gibbs, supt	88, 648 50		
Labor acc't	4, 442 65		
Petroleums	8, 412 45		
Box and can acc't	17, 191 10		
Barrel acc't	3, 274 54		
Real estate acc't	351, 257 54		
Expenses acc't	941 08		
Kerosene oils	104, 998 25		
	$591, 820 22		$591, 820 22

E. E. February 1, 1867.
G. W. AUSTEN, Sec'y.

270 DR. *Statement.* CR

Kerosene Oil Manufactory account balance		$104,998 25	61 bbls. crude to arrive from Wheeler, 2,562 gals., at 15 cents		384 30
Accounts above chargeable		136,121 97	134 bbls. crude, bound and due from E. Trans. Co		1,354 07
Draft of C. L. Wheeler to arrive		500	G. C. Gibbs' draft to 31 January, 1867	$49,982 40	
Freight due on oil arrived from Wheeler:			Rec'd at works to 31 Jan., '67, 605,553 gals. at 8 cents	48,444 24	
Arrived at works to 31 Jan	2,287 bbls.				1,538 16
Freight paid on	229		Stock on hand		94,946 52
At $2.90 on	2,058 bbls.	5,968 20	Balance deficiency		188,950 88
Draft to arrive from Wheeler		0 00			
Freight due on Dennis Run Oil:					
Arr. at works to 31 Jan. '67	14,096 bbls.				
Freight paid on	11,717				
	2,379 at $3.30	7,850 70			
Unsettled bills		31,734 81			
		$287,173 93			$287,173 93
			Balance 1st January		$192,576 28
			do. February		188,956 52
			Profit		$3,629 76

271 DEF'T'S EXHIBIT NO. 3.—JAN. 23D, 1873.

DR. *Ledger balance to 1st March, 1867.* CR.

C. L. Wheeler, salary acc't	$1,165		Capital stock	$500,000
A. M. Cozzens	700		Cozzens & Co	118,651 70
Interest acc't	1,753 60			
Fuels	18,486 31			
Int. revenue	424 64			
J. F. Waller	300			
J. B. Cozzens	1,715 14			
W. D. Cozzens	458			
C. L. Wheeler, petroleums	141 90			
Chemicals	1,262 71			
G. C. Gibbs, supt	130,287			
Labor	9,730 09			
Box and can acc't	33,884 14			
Real estate and int	352,234 23			
Expense acc't	2,023 14			
Barrel acc't	8,966 65			
Petroleums	50,079 19			
Kerosene oils	5,049 96			
	$618,651 70			$618,651 70

March, 1, 1867.
G. W. AUSTEN, Sec'y.

272 DR. *Statement.* CR.

Accounts above chargeable		$267,951 70	134 bbls. crude, bound and due from E. Trans. Co		$1,354 07
Freight due on Dennis Run oil:			G. C. Gibbs' d'fts to 28 Feb., '67	$72,820 80	
Rec'd at works to 28 Feb., '67	19,737 bbls.		Less received at works to 28 Feb., '67, 860,340 gals. at 8 c	68,827 20	
Paid freight on	17,414				3,993 60
	2,323 at $3.30	7,665 90	Account of stock		88,101
		37,458 93	Balance deficiency		219,627 86
Unsettled bills					
		$313,076 53			$313,076 53
			Balance 1st March, 1867		$219,627 86
			do. 1st February, 1867		188,950 88
			Losses on naptha charged in Feb., $7,905		$3,676 98

DEF'T'S EXHIBIT No. 4.—JAN. 23D, 1873.

DR. *Ledger balance to 1st April, 1867.* CR.

C. L. Wheeler, salary acc't	$1,165	Capital stock	$500,000
A. M. Cozzens	700	Cozzens & Co	139,909 24
Interest acc't	2,881 50	Kerosesne oils	97,854 97
Fuels	24,562 76		
U. S. int. revenue	704 94		
J. F. Waller	300		
J. B. Cozzens, sup't	1,945 59		
273 W. D. Cozzens	598		
C. L. Wheeler, petroleums	158 65		
Chemicals	3,298 81		
Labor acc't	15,263 90		
Barrel acc't	23,314 98		
Petroleums	92,111 52		
S. F. Wheeler, petroleums	20 13		
G. C. Gibbs, sup't	172,356 30		
Box and can acc't	41,285 35		
Real estate acc't	352,556 90		
Expense acc't	4,539 88		
	$737,764 21		$737,764 21

E. E. April 1, 1867.
G. W. AUSTEN, Sec'y.

DR. *Statement.* CR.

Accounts above chargeable		387,064 21	Kerosene oils, balance of		$97,854 97
Balance due from Dennis Run Oil Co. per contract, considered as bad		5,774 36	G.C. Gibbs' d'fts to 31 Mar., '67	$96,453 00	
Freight due on Dennis Run oil: Rec'd at works to 31 Mar., '67	25,857 bbls.		Oil rec'd at works to 31 Mar., '67, 1,133,483 gals. at 8 cents	90,678 64	
Freight paid on	23,001				5,774 36
	2,856 at $3.30	9,424 80	Stock on hand		100,349 14
Balance due ex. co. on freight, being in difference of guages		2,541	Balance deficiency		239,424 87
Unsettled bills		38,598 97			
		$443,403 34			$443,403 34
274 Outside losses:					
Dennis Run oil on guages		$5,774 36	Balance 1st April		$239,424 87
Ship't per Kathleen		544 64	do. 1st March		219,627 86
Do. Rhea Silvia		2,470 81			
Do. Earl Shaftsbury		5,538 83			$19,797 01
Do. Perseverance		6,480 21			
		$20,808 85			

DEF'T'S EXHIBIT No. 5.—JAN. 23D, 1873.

DR. *Ledger balance to 1st May, 1867.* CR.

C. L. Wheeler, salary	$1,315	Capital stock	$500,000
A. M. Cozzens	700	Cozzens & Co	132,573 32
Interest acc't	5,064 09	Kerosene oils	350,762 76
Fuels	24,562 76		
U. S. int. revenue	811 54		
J. F. Waller	375		
J. B. Cozzens, sup't	2,268 16		
C. L. Wheeler, petroleums	158 65		
Chemicals	6,593 88		
Labor acc't	22,809 38		
S. F. Wheeler	320 13		
G. C. Gibbs, sup't	180,045 30		
Box and can acc't	58,878 38		
Real estate, &c	355,371 67		
W. D. Cozzens	600		
275 Petroleums	164,996 10		
Expense acc't	5,299 45		
Barrel acc't	153,166 59		
	$983,336 08		$983,336 08

E. E. May 1, 1867.
G. W. AUSTEN, Sec'y.

DR. *Statement.* CR.

Accounts above chargeable	632,636 08	Kerosene oils	$350,762 76
Unsettled bills	46,822 89	Stock on hand	90,492 59
		Bal. deficiency	238,203 62
	$679,458 97		$679,458 97
Outside losses:		Bal. April 1	$239,424 87
Ship't per Brodine 85,440 80		" May 1	238,203 62
			$1,221 25

DEF'T'S EXHIBIT NO. 6.—JAN. 23D, 1873.

DR. *Ledger balance on 1st June, 1867.* CR.

C. L. Wheeler, salary	$1,465	Capital stock	$500,000
A. M. Cozzens	700	Cozzens & Co	111,371 99
Interest acc't	5,797 18	Kerosene oils	419,260 63
Fuels	24,562 76		
U. S. int. revenue	917 89		
J. F. Waller	500		
J. B. Cozzens, sup't	2,643 16		
276 C. L. Wheeler, petroleums	358 65		
Chemicals	6,593 88		
Labor acc't	26,758 12		
S. F. Wheeler	320 13		
G. C. Gibbs	181,781 10		
Boxes and cans	82,301 18		
Real estate	357,474 31		
W. D. Cozzens	720		
Petroleums	171,388 08	E. E. June 1, 1867.	
Expense acc't	7,511 65	G. W. AUSTEN, Sec'y.	
Barrel acc't	158,839 53	A. M. COZZENS.	
	$1,030,632 62		$1,030,632 62

DR. *Statement.* CR.

DEF'T'S EXHIBIT NO. 7.—JAN. 23D, 1873.

Accounts above chargeable	$679,932 62	Kerosene oils	$419,260 63
Unsettled bills	33,772 73	Stock on hand	56,579 27
		Bal. deficiency	237,865 45
	$713,705 35		$713,705 35

Bal. May 1, 1867	$238,202 62
Bal. June 1, 1867	237,865 45
	338 17

277 DEF'TS EXHIBIT NO. 8.—JAN. 23, 1873.

*Ledger balance, July 1st, 1867.**

A. M. Cozzens	200	$700	Capital stock	1	$500,000
C. L. Wheeler, petroleum acc't	259	458 65	C. L. Wheeler, salary acc't	128	35
Kerosene oils	285	95,219 12	J. F. Waller	224	150
G. C. Gibbs, sup't	289	181,781 10	Cozzens & Co	257	128,951 16
W. D. Cozzens	293	295			
J. B. Cozzens, salary acc't	299	682 29			
Real estate acc't	302	350,000			
		$629,136 16			$629,136 16

* After charging acc'ts.

*Ledger balance on July 1st, 1867.**

C. L. Wheeler, salary acc't	128	$1,465	Capital stock	1	500,000
A. M. Cozzens	200	700	Cozzens & Co	257	128,951 16
Interest acc't	209	6,505 06	Kerosene oils	285	444,563 28
Fuel, coal, &c	217	24,562 76			
U. S. int. revenue	222	2,066 54			
J. F. Waller	224	600			
C. L. Wheeler, petroleum acc't	259	458 65			
Chemicals	270	10,058 19			
Labor acc't	276	29,428 07			
S. F. Wheeler	288	320 13			
G. C. Gibbs	289	181,781 10			
278 W. D. Cozzens	293	895			
Petroleums	294	195,612 92			
Barrel acc't	297	154,662 79			
John B. Cozzens	299	3,682 29			
Box and can acc't	300	93,148 68			
Real estate acc't	302	358,629 14			
Expense acc't	304	8,938 12			
		$1,073 514 44			$1,073,514 44
Acc'ts above chargeable		$732,814 44	Kerosene oils		$444,563 28
Unsettled bills		38,619 53	Stock on hand		77,913 29
			Bal. deficiency		238,957 40
		$761,433 97			$761,433 97
			Bal. July 1, 1867		$238,957 40
			Bal. June 1, 1867		237,865 45
			Loss		$1,091 95

* Before charging acc'ts.

279 DEF'T'S EXHIBIT NO. 9.—JAN. 23, 1867.

Ledger balance, Aug. 1, 1873.

C. L. Wheeler, salary acc't	128	$315	Capital stock	1	500,000
A. M. Cozzens	200	700	J. Waller	224	95 42
Interest acc't	209	862 69	Cozzens & Co	312	98,834 88
U. S. int. revenue	222	165 40	Kerosene oils		28,184 09
C. L. Wheeler, petroleum acc't	259	12,458 65			
Chemicals	270	536 97			
Kerosene oils	285				
W. C. Gibbs, sup't	289	181,781 10			
W. D. Cozzens	293	395			
Barrel acc't	297	15,556 63			
John B. Cozzens	299	1,260 36			
Box and can acc't	300	10,916 48			
Real estate acc't	302	350,425 65			
Expense acc't	305	1,303 42			
Petroleums	307	45,283 38			
Labor acc't	310	5,253 66			
		$627,114 39			$627,114 39
			Kerosene oils		$28,184 09
Accounts above chargeable		$276,414 39	Stock on hand		102,749 26
Unsettled bills		72,355 21	Balance deficiency		217,836 25
		$348,769 69			$348,769 60
280			Balance July 1, 1867		$238,957 40
			do Aug. 1, 1867		217,836 25
			Profit		$21,121 15

DEF'T'S EXHIBIT NO. 10.—JAN. 23, 1873.

Ledger balance, Sept. 1st, 1867.

C. L. Wheeler, salary acc't	128		915	Capital stock	1		500,000
A. M. Cozzens	200		700	Kerosene oils	285		187,448 24
Interest acc't	209		1,573 83	Cozzens & Co	312		87,064 88
U. S. int. revenue	222		714 35				
Chemicals	270		4,021				
G. C. Gibbs, sup't	289		181,781 10				
W. D. Cozzens	293		535				
John B. Cozzens	299		1,856 63				
Box and can acc't	300		25,571 83				
Real estate acc't	302		351,027 42				
Expense acc't	306		2,158 24				
Petroleums	307		140,723 44				
Labor acc't	310		10,587 21				
Barrel acc't	314		43,333 90				
C. L. Wheeler, petroleum acc't	316		9,014 17				
			$774,513 12				$774,513 12
281 Acct's above chargeable		$423,813 12		Kerosene oils			$187,448 24
Unpaid bills		54,862 93		Stock on hand			77,640 11
				Bal. deficiency			213,587 70
		$478,676 05					$478,676 05
To be added to unpaid bills		1,665 49		To be added to stock			4,122 53
Aug. 27. Deficiency		217,836 25		Bal. Aug. 1, '67			217,836 25
Sept. 1. Deficiency		211,130 66		Bal. Sept. 1, '67			213,587 70
				Com. 12,788	Profit		4,248 55
				4,248			2,457 04
		$6,705 59		$17,000			$6,765 59

DEF'T'S EXHIBIT NO. 11.—JAN. 23D, 1873.

Ledger balance, October 1, 1867.

C. L. Wheeler, salary	128		715	Capitol stock			1,500,000
A. M. Cozzens	200		700	Cozzens & Co	312		127,016 33
Interest acc't	209		2,367 86	Kerosene oils	318		344,303 39
U. S. int. revenue	222		852 80				
J. F. Waller	224		225				
Fuel, coal, &c	217		7,010 62				
Chemicals	270		6,304				
G. C. Gibbs, sup't	289		181,781 10				
W. D. Cozzens	293		608				
282 John B. Cozzens	299		1,781 63				
Box and can acc't	301		46,930 98				
Real estate acc't	303		353,623 17				
Expense acc't	306		3,561 72				
Petroleums	308		212,613 56				
Labor	310		16,185 90				
Barrel acc't	315		81,044 21				
C. L. Wheeler, petroleum acc't	316		55,014 17				
			$971,319 72				$971,319 72
Accounts above chargeable		$620,619 72		Kerosene oils			$344,303 39
Unpaid bills		56,262 61		Stock on hand			145,519 73
				Balance deficiency			187,059 21
		$676,882 33					$676,882 33
				Balance Sept. 1, 1867		$211,130 66	
				Balance Oct. 1, 1867		187,059 21	
				Profit		$24,071 45	
				Commissions		12,751 17	

283 DEF'T'S EXHIBIT NO. 12.—JAN. 23D, 1873.

Ledger balance, Nov. 1, 1867.

C. L. Wheeler, salary acc't	128	765	Capital stock	1	500,000
A. M. Cozzens	200	700	Cozzens & Co	312	95,126 36
Interest acc't	209	3,746 62	Kerosene oils	318	525,342 92
U. S. int. revenue	222	956 05			
J. F. Waller	224	300			
Fuel, coal, &c	217	14,279 14			
Chemicals	270	8,939 38			
G. C. Gibbs, supt	289	181,781 10			
W. D. Cozzens	293	735			
J. B. Cozzens, supt	299	2,762 67			
Box and can acc't	301	57,363 92			
Real estate acc't	303	355,747 87			
Petroleums	309	266,092 45			
Labor acc't	310	23,942 22			
Barrel acc't	315	112,081 95			
C. L. Wheeler, petroleum acc't	316	83,014 17			
Expense acc't	320	7,261 74			
		$1,120,469 28			$1,120,469 28
284 Accounts above chargeable		769,769 28	Kerosene oils		525,342 92
Unpaid bills		64,447 08	Stock on hand		101,978 28
			Balance deficiency		206,895 16
		$834,216 36			$834,216 36
			Balance Oct. 1, 1867		$187,059 21
			Balance Nov. 1, 1867		206,895 16
					$19,835 95

DEF'T'S EXHIBIT NO. 13.—JAN. 23D, 1867.

Ledger balance, December 1st, 1873.

A. M. Cozzens	200	700		Capital stock	1	500,000 62
Interest acc't	209	4,411 34		Cozzens & Co	312	120,629 27
Fuels	217	16,879 40		" "	312	6,076
U. S. int. revenue	222	1,140 60		Kerosene oils	318	640,540 90
J. F. Waller	224	375				
Chemicals	270	11,477 50				
G. C. Gibbs, supt	289	181,781 10				
W. D. Cozzens	293	835				
J. B. Cozzens, supt	299	3,222 67				
Box and can acc't	301	77,259 32				
Petroleums	309	386,579 33				
Labor acc't	310	30,645 23				
C. L. Wheeler, petroleu acc't	316	41,954 99				
Expense acc't	320	8,678 85				
285 C. L. Wheeler, salary acc't	326	1,265				
Barrel acc't	327	141,508 17				
Real estate acc't	332	358,533 29				
		$1,267,246 79				$1,267,246 79
Acc'ts above chargeable		$916,546 79		Kerosene oils		640,540 90
Unpaid bills		54,061 89		Stock on hand		109,728 43
" Erie Railway		6,016 25		Balance deficiency		226,355 60
		$976,624 93				$976,624 93
Loss shipment, per "Boaz,"		$3,141 59		Balance Nov. 1, 1867		$206,895 16
" " "Pathfinder,"		2,934 68		" Dec. 1, 1867		226,355 60
Colwell & Bro		5,049 46				
Conklin, Son & Co		596		Loss		$19,460 44
		$11,721 73				
Interest		664				
Commission		9,833				
		$22,218 73		Loss on Wheeler's oil, 12,481 gals.		

283 DEFENDANT'S EXHIBIT A.—JANUARY 23, 1873.

[Hiram Barney, William Allen Butler, Geo. W. Parsons, Thos. E. Stillman.]

NEW YORK, 1861.

M. N. Y. Kerosene Oil Co. to BARNEY, BUTLER & PARSONS, Dr.
Trinity Building (111 Broadway).

1867. To professional services as follows:

April. To examination of title to premises in Queens Co. for loan by G. & Ind'y Co..... 250

Disbursements.

Expense to Jamaica	75	
C. clerk's search	7 35	
Filing and recording	4 00	
Postage	39	
		12 49
		262 49

May 27, 1877.

[2 cent stamp May 27, '67. B. B. & P.]

Received payment by check on Metropolitan Bank.

BARNEY, BUTLER & PARSONS,
Per JAS. W. BYWATER.

237 EXHIBIT No. 1.—

Notes and

Date.	No.	Drawer.	In favor of—	On what account.
1867.				
Jan. 2, Jan'y 2	102	Cozzens & Co	A. M. C., pres't, T. Crane pres't W'h'se Co.	Accommodation
" 22, " 22	103	Do	A. M. C., pres't, T. Crane pres't W'h'se Co.	
Feb'y 11, Feb'y 11	104	Do	A. M. C., pres't, T. Crane pres't W'h'se Co.	A. T. Hall
" 15, " 15	105	A. M. Cozzens	Cozzens & Co., (N. Y. Guar. & Indem. Co.)	
" 26, " 26	106	Cozzens & Co	Cozzens & Co. and W. H. Appleton at bank.	
Mar. 4, Mar. 4	107	"	Cozzens & Co. to Quintard, Ward & Co.	Loan
" 10, " 10	108	"	Cozzens & Co. and W. H. Appleton.	Accommodation
" 12, " 12	109	"	Cozzens & Co	A. T. Hall
" 13. " 13	110	"	M. O. Roberts	For bal. of acc't
Ap'l 15, Ap'l 15	111	A. M. Cozzens, pres't, d'f't on.	Cozzens & Co., for Cooper, Hewitt & Co.	
" " " 15	112	A. M. Cozzens, pres't, d'f't on.	Cozzens & Co., for Cooper, Hewitt & Co.	
" " " 15	113	A. M. Cozzens, pres't, d'f't on.	Cozzens & Co., for Cooper, Hewitt & Co.	
May 11	114	A. M. Cozzens, pres't, d'f't on.	Cozzens & Co., N. Y. Guaranty & Co.	Renewal of No. 105
" 18	114½	A. M. Cozzens, pres't, d'f't on	Cozzens & Co., N. Y. Guaranty & Co.	
May 16	115	Cozzens' acc't	T. Merrifield	
" "	116	"	"	
May 10, June 3	117	"	Cozzens & Co	Ac. A. T. Hall
June 15	118	"	"	Quintard, Ward & Co.
" 22	120	A. M. Cozzens, pres't	"	N. Y. Guar. & Ind. Co.
June 21	119	A. M. Cozzens, pres't	Cozzens & Co	N. Y. Guar. & Ind. Co.
" 28	121	Cozzens & Co.	Wm. H. Appleton	Accommodation
" 17	122	Do	A. M. Cozzens, pres't	" A. T. Hall.
July 9	123	Do	LeComte & Perkins	
" 10	124	Do	Quintard, Ward & Co	Coal for June
" 11 & 13	125	Do	A. M. C., pres't. W. H. Appleton.	
" 13	126	A. M. Cozzens, pres't	Cozzens & Co., N. Y. Guar. Indem. Co.	
" 23	127	Cozzens & Co.	Pennsylvania Coal Co	
" 25	128	Do	T. Merrifield & Co	
Aug. 12	131	Do	Le Comte & Perkins	Acc't tin cans
" 21	132	A. M. Cozzens, pres't	Cozzens & Co	Renewal of No. 119
" 6	133	Cozzens & Co	Snow & Burgess	Shipm'ts Geo. Crown
" 22	134	A. M. Cozzens, pres't	Cozzens & Co	Renewal of No. 120
Sept. 6	135	Cozzens & Co	T. Merrifield	Acc't, cans
" 14	136	A. M. Cozzens, pres't	Cozzens & Co	N. Y. Guar. & Ind. Co.
" 19	137	Cozzens & Co	Le Comte & Perkins	On acc't
" 25	138	Do	T. Merrifield	" "
Oct, 4	139	Do	do	" "
" "	140	Do	do	" "
Oct. 8	141	Cozzens & Co	H. Solms	On acc't
21	142	Do	Quintard, Ward & Co	Bill for coal
8	143	W. W. Ballard & Co	W. W. B. & Co	Shooks
8	144	Do	do	do
19	145	A. M. Cozzens, pres't.	Cozzens & Co	Renewal of No. 132
21	146	Do	do	" " 134
25	147	Cozzens & Co	Le Comte & Perkins	Acc't cans
8	148	W. W. Ballard & Co	W. W. B. & Co	" shooks
30	149	Cozzens & Co.	W. H. Appleton	Accommodation
10	150	Do	Wm. H. Osborne	Acc't loan
17	151	Do	do	Bal. "
Nov. 4	152	Do	Le Comte & Perkins	Acc't cans
Oct. 31	153	W. W. Ballard & Co	W. W. B & Co.	Shooks
Nov. 7	154	Edw'd G. Catlin	E. G. C	
7	155	Cozzens & Co.	Le Comte & Perkins	Acc't cans
8	156	Do	Quintard, Ward & Co	Coal
13	157	A. M. Cozzens, pres't	Cozzens & Co	N. Y. Guar. & Ind. Co.
Oct. 22	158	Cozzens & Co.	A. M. Cozzens, pres't	W. H. Appleton, accom.
Nov. 7	159	Do	do	do
11	160	Cozzens & Co	A. M. Cozzens, pres't	W. H. Appleton, accom.
14	161	Do	S. F. Cozzens (loan)	

JAN'Y 28TH, 1873.

bills payable.

Time.	When due.												Amount.	Remarks.
	Y'r.	Ja.	Fb.	Mh.	Ap.	My.	Jn.	Jly.	Au.	Sp.	Oc.	Nv.	Dc.	Dollars. Cts.	
15 days date		20												50,000	Ex. "219.
15 " "			9											50,000	Ex. "227.
3 mo's						14	at Met'r. B'k							10,000	Ex. "230.
60 days					19									50,000	Ex. "228.
4 mo's							29							30,000	Ex. "
2 "						7								5,166 25	Ex. "257.
4 "								13						30,000	Ex.
3 "							15							10,000	Ex. "238.
4 "								16						3,184 98	Ex.
30 days						18								10,105 38	Ex.
60 "							17							10,163 95	Ex.
80 "								7						10,203	Ex.
60 "								13						50,000	C. B. 275.
30 "							20							25,000	Ex. 258, C. B. Rn. No. 119.
2 mo's							19							3,000	
"														2,500	
3 "								19						10,000	
3 mo's									18					7,010 62	
60 days								22						25,000	C. B. 289.
60 days								21						25,000	C. B. 289.
4 mo's										31				30,000	
3 do									20					10,000	
60 days									10					1,700	
4 mo's												13		2,600 26	
4 mo's												14		30,000	
60 days									14					50,000	
3 mo's										26				7,268 52	
60 days									26					2,669 94	
60 "										14				2,000	
60 "										20				25,000	
60 "										8				1,450 60	
60 "										21				25,000	
60 "											8			2,738 69	
60 "											16			50,000	
60 "											21			3,000	Paybl. at M't. Nat. Bank.
60 "											27			2,600	" "
											6			1,000	" "
											6			2,000	" "
30 "											10			1,500	Paybl. at Met. Nat. Bank.
90 "		21												2,933 38	" "
45 "											25			804 87	" "
60 "												10		407 19	" "
60 "												18		25,000	" "
60 "												20		25,000	" "
60 "												27		1,500	" "
60 "												10		400	" "
4 mo's				3										30,000	" "
3 "		13												7,607 92	" "
2 "												20		7,572 92	" "
60 days		6												1,500	" "
60 "		2												807 17	" "
60 "		9												2,400	" "
60 "		9												2,500	" "
3 mo's			11											5,620 87	" "
60 days		12												50,000	
3 mo's		25												5,000	" "
3 mo's			10											10,000	" "
4 mo's				14										15,000	
3 "			17											3,000	" "

EXHIBIT No.

Date.	No.	Drawer.	In favor of.	On what account.
288]				
1867.				
Nov. 7	162	W. W. Ballard & Co ..	W. W. B. & Co	Shooks .....
11	163	Do	..... do	.... do .....
15	164	Do.....	..... do	.... do .....
20	165	Cozzens & Co	A. M. C., pres't	A. T. Hall .....
25	166	Do.....	Colwell & Bro	.....
27	167	Do	W. W. Ballard & Co	Shooks .....
18	168	W. W. Ballard & Co ..	..... do	.....
30	169	Cozzens & Co.....	Quintard, Ward & Co	Coal .....
Dec. 4	170	Do.....	Le Comte & Perkins.....	Cans.....
5	171	Do.....	H. Solms	Boxes.....
9	172	Do.....	Aymar & Co	.....
11	173	Do.....	T. Merrifield.....	Cans.....
2	174	Do.....	W. W. Ballard & Co	Shooks .....
10	175	W. W. Ballard & Co...	..... do	.....
10	176	Do	..... do	.....
14	177	Cozzens & Co.....	Le Comte & Perkins	Cans.....
6	178	W. W. Ballard & Co...	W. W. Ballard & Co	Shooks .....
Dec. 18	179	Cozzens & Co.....	A. M. Cozzens, pres't.....	N. Y. Guar. & Ind. Co
6	180	W. W. Ballard & Co ..	W. W. B. & Co	Shooks.....
"	181	Do.....	..... do	.....
14	182	Do.....	..... do	.....
24	183	Cozzens & Co.....	A. M. Cozzens, pres't	M. O. Roberts .....
26	184	"	Cozzens & Co	H. Robbins .....
"	165	"	"	" .....
"	186	"	"	" .....
14	187	W. W. Ballard & Co ..	W. W. B. & Co	Shooks.....
21	188	"	"	" .....
21	189	"	"	" .....
28	190	Cozzens & Co	Colwell Bros	.....
31	191	W. W. Ballard & Co ..	W. W. B. & Co.....	Shooks .....
'68. Jan. 2	192	Cozzens & Co.....	C. & Co.....	H. Robbins .....
'67. D'c. 20	193	"	A. M. Cozzens, pres't	N. Y. Guar. & Ind. Co
'68. Jan. 6	194	W. W. Ballard & Co ..	W. W. B. & Co.....	Shooks .....
13	195	Cozzens & Co.....	E. Cozzens & Co.....	Accommodation .....
10	196	Do.....	T. W. Green & Co.....	Loan .....
11	197	Do (cancelled)...	E. Cozzens	Accommodation .....
10	198	W. W. Ballard & Co ..	W. F. Corey	Shooks .....
2	199	Do.....	W. W. B. & Co.....	" .....
15	200	Cozzens & Co.....	M. Kalbfleisch & Sons.....	.....
"	201	Do.....	A. M. Cozzens, pres't	(See No. 204) .....
15	202	Cozzens & Co.....	Quintard, Ward & Co	Coal .....
13	203	W. W. Ballard & Co ..	Ely Davis.....	Shooks .....
15	204	Cozzens & Co.....	A. M. Cozzens, pres't.....	A. T. Hall .....
16	205	Do.....	E. Cozzens & Co.....	Accommodation .....
17	206	Do.....	Piersons & Co.....	Iron .....
9	207	W. W. Ballard & Co ..	Perry & Scott.....	Shooks .....
14	208	Do.....	M. T. Brodrick, V. p't	" .....
"	209	Do.....	Ely Davis.....	" .....
2	210	Do.....	Spalding, Haskell & Co.....	" .....
23	211	Cozzens & Co.....	A. M. Cozzens, pres't	.....
Dec. 21	212	W. W. Ballard & Co ..	A. F. Potter.....	Shooks.....
Jan. 27	213	Cozzens & Co.....	Colwell Bros	.....
28	214	Do.....	C. & Co.....	F. W. & G. F. Leggett
Sept. 30, '67	215	Do.....	... do	Grant & Son.....

1—Continued.

Time.	When due.													Amount.	Remarks.	
	Y'r.	Jn.	Fb.	Mh.	Ap.	My.	Jn.	Jly.	Ag.	Sp.	Oc.	Nv.	De	Dollars. Cts.		
60 days		9												807 19	Paybl. at Met. Nat. Bank	
60 "		13												807 19	"	"
2 mo's		18												807 19	"	"
60 days		22												10,000	"	"
60 "		27												2,500	"	"
60 "		29												807 19	"	"
2 mo's		2												807 19	"	"
3 "				3										6,167 92	"	"
60 days			5											1,360	"	"
30 "		7												867 51	"	"
18 "													27	10,000		
2 mo's			14											1,480	"	"
2 "			5											807 19	"	"
2 "			13											1,200	"	"
2 "			13											407 19	"	"
60 days			15											1,500	"	"
2 mo's			9											550 40	"	"
60 days			16											25,000	Paybl. at Met. Nat. Bank	
2 mo's			9											256 79	"	"
2 "			9											250	"	"
2 "			17											400	"	"
90 days					26									10,000		
20 "		18												4,698 79	"	"
35 "			2											4,772 27	"	"
45 "			12											4,721 54	"	"
2 mo's			17											576 81	"	"
2 "			24											478 90	"	"
2 "			24											500	"	"
3 "				31										2,556 53	"	"
2 "				3										802 67	"	"
2 "				5										1,890	"	"
60 days			18											25,000		
2 mo's				9										802 67	"	"
3 "					16									2,000	"	"
15 days		28												6,000	"	"
3 mo's					14									1,000	"	"
2 mo's				13										84 93	"	"
2 "				5										802 67	"	"
30 days			17											3,930 89	"	"
3 mo's					18									10,000	"	"
3 "					18									1,970 54	"	"
2 "				16										802 67	"	"
3 "					18									10,000		
3 "					19									1,000	"	"
30 days			19											2,153 42	"	"
2 mo's				12										307 02	"	"
2 "				17										146 33	"	"
2 "				17										802 67	"	"
2 "				5										65 44	"	"
3 "					26									10,000	"	"
2 "			24											128 96	"	"
15 days			14											2,510	"	"
20 "			20											2,242 90	"	"
On demand														80,000		

289 *Defendant's Exhibit A, February 4th*, 1873.

[Int. rev. stamp, $50.00, cancelled.]
[Int. rev. stamp, $50.00, cancelled.]

This indenture, made the twenty-ninth day of April, in the year one thousand eight hundred and sixty-seven, between the New York Kerosene Oil Company, a manufacturing corporation created under the laws of the State of New York, of the first part, and The New York Guaranty and Indemnity Company, of the city of New York, of the second part.

Whereas, at a regular meeting of the board of trustees of the said The New York Kerosene Oil Company, held on the ninth day of March, one thousand eight hundred and sixty-seven, it was resolved that Abraham M. Cozzens, the president of said company, be authorized to borrow a sum not to exceed one hundred thousand dollars, and to secure the same to execute a mortgage upon the factory and premises of the said company, at Newtown, Queens County, Long Island;

And whereas, the said Abraham M. Cozzens has made and delivered to the said parties of the second part his certain bond or obligation bearing even date with these presents in the penal sum of one hundred thousand dollars, lawful money of the United States of America, which said bond declares that the same is given to secure advances to be made by the said party of the second part to the said Abraham M. Cozzens, in all not to exceed the sum of one hundred thousand dollars, upon certain conditions therein contained, as by reference to said bond will more fully appear, and the consent of stockholders of said party of the first part to the making of this mortgage having been first duly given and filed pursuant to law and recorded herewith:

290 Now, this indenture witnesseth that the said parties of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey, and confirm unto the said parties of the second part, and to their successors and assigns forever, all those certain pieces or parcels of land lying together, situate in the town of Newtown, County of Queens, and State of New York, which, taken together, are bounded and described as follows, that is to say: Beginning at a stake at the intersection of the division land between land lately belonging to Helena Kowenhoven and land lately belonging to the heirs of Agnes Pine, deceased, with the centre line of a street one hundred feet wide, laid out, or to be laid out, which centre line of such street, measured on such division line, is distant six hundred and sixty-seven feet easterly from the edge of the meadow on Newtown Creek, as such meadow formerly was, and running thence southeastwardly along the centre line of such street, laid out, or to be laid out, four hundred and twenty-one feet and two inches, more or less, to the northerly line of land now or late of Orsamus Bushnell, formerly of Paul Rapelyea; thence southwestwardly along such last-mentioned land six hundred and five feet three inches, to the edge of the meadows as formerly existing; thence continuing on the same course to the Newtown Creek; thence along Newtown Creek three hundred and

twenty-seven feet and nine inches, more or less, to the division line between the land late of Helena Kowenhoven and land late of the
291 heirs of Agnes Pine, deceased, and thence northeastwardly along such division line eight hundred and sixty feet, more or less, to the place of beginning; together with the right to the land under water in Newtown Creek, in front of the above-described premises, and all the water right and privileges to the said premises belonging or in anywise appertaining.

And also, all that triangular piece of land situated at Dutch Kills, in Newtown, Queens County, and State of New York, and bounded as follows: Beginning at a point on the easterly side of Newtown Creek, adjoining land heretofore conveyed by Neziah Bliss and Samuel Sneden, and their respective wives, to Erastus W. Smith, and late of the North American Kerosene Gas Light Company; running thence northeasterly along the said land late of the said company to a point where the same is intersected by the centre line of First street, as said street is laid down on a certain map filed in the clerk's office of Queens County, entitled "Map of the farm of Francis and Eve Duryee, situated on the Newtown and Dutch Kills Creeks, in Newtown, Queens County, as surveyed and a portion thereof laid out into lots for Neziah Bliss and Samuel Sneden, by Van Alst and Meserole, city surveyors, May, 1856"; thence westerly along the centre line of said street to the easterly side of Newtown Creek, and thence southerly along Newtown Creek to the place of beginning, together with the right to the land under the waters of Newtown Creek in front of said last described premises. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in, and to the same, and every part and parcel
292 thereof, with the appurtenances, to have and to hold the above granted and described premises, with the appurtenances, unto the said parties of the second part, their successors and assigns, to their own proper use, benefit, and behoof forever. Provided always, and these presents are upon the express condition, that if the said parties of the first part, their successors or assigns, shall well and truly pay unto the said parties of the second part, their successors or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents and the estate hereby granted, shall cease, determine, and be void. And the said Abraham M. Cozzens, for himself, his heirs, executors, doth covenant and agree to pay unto the said party of the second part, their successors or assigns, the said sum of money and interest, as mentioned above, and expressed in the condition of the said bond. And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the said parties of the second part, their successors and assigns, to enter into and upon all and singular the premises hereby granted or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said parties of the first part, their successors or assigns therein, at public auction, according to the act in such case made and provided. And as the attorney of the said parties of the first part for that purpose by these presents duly authorized, constituted, and appointed, to make

and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of
293 the premises, rendering the overplus of the purchase-money (if any there shall be) unto the said parties of the first part, their successors or assigns, which sale so to be made shall forever be a perpetual bar, both in law and equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from or under them, or either of them.

In witness whereof the parties of the first part to these presents have hereunto set their corporate seal the day and year first above written.

[CORPORATE SEAL.] GEORGE W. AUSTIN,
Secretary.
ABRAHAM M. COZZENS,
President N. Y. Kerosene Oil Co.

Sealed and delivered in the presence of—

STATE OF NEW YORK,
City and County of New York, ss:

On this seventh day of May, in the year eighteen hundred and sixty seven, before me personally came Abraham M. Cozzens, president, and George W. Austin, secretary of the New York Kerosene Oil Company, the corporation described in and which executed the foregoing instrument, and the said Cozzens and the said Austin being to me severally personally known, and being by me severally duly sworn, did depose and say, each for himself, that the seal affixed to the foregoing instrument, and opposite to which their names are respectively set, is the corporate seal of the said corporation, and that the said seal was thereto affixed by the authority of said corporation; and the said Abraham M. Cozzens did further depose and say that he resides in the city of New York; that he is the president of the said The New York Kerosene Oil Company, the corporation described in and which executed the
294 foregoing instrument, and that he subscribed his name thereto, opposite to said seal, by the authority of said corporation. And the said George W. Austin did further depose and say that he is the secretary of the said The New York Kerosene Oil Company, the corporation described in and which executed the foregoing instrument; that he resides at Fort Hamilton, county of Kings and State of New York; and that he subscribed his name to said instrument, opposite to said seal, by the authority of said corporation.

T. L. OGDEN,
Notary Public, New York County.

Recorded in Queen's County clerk's office, in liber 139 of mortgages, page 400, &c., May 11th, 1867, at 4 o'clock p. m.

Examined by—

JONAH T. HEGEMAN, *Clerk.*

(Endorsed:) The New York Kerosene Oil Company to the New York Guaranty and Indemnity Company. Mortgage.

Defendant's Exhibit B, February 4, 1873.

Know all men by these presents that I, Abraham M. Cozzens, of the

city of New York, am held and firmly bound unto the New York Guaranty and Indemnity Company, in the sum of one hundred thousand dollars, lawful money of the United States of America, to be paid to the said New York Guaranty and Indemnity Company, their successors or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents, sealed with my seal. Dated the twenty-ninth day of April, one thousand eight hundred and sixty-seven.

295. This bond is given to cover advances of money now or hereafter to be made by the said The New York Guaranty and Indemnity Company to the said Abraham M. Cozzens, for the sum of one hundred thousand dollars, or any less amount, upon the condition that whenever any sum shall be advanced on this bond by the said The New York Guaranty and Indemnity Company to the said Abraham M. Cozzens, the amount of such advance, and the date of the same, shall be endorsed on this instrument and signed by the said Abraham M. Cozzens; and when the same or any part thereof shall be paid, such payment shall be endorsed on or under such statement of advance; and the amount which shall at any time appear by said endorsements of advance and payment to be then due, shall be taken and considered as the true amount due on said bond, and for which the premises which have this day been conveyed to the said The New York Guaranty and Indemnity Company by the New York Kerosene Oil Company by indenture of martgage, bearing even date herewith, shall be held liable, and for no greater sum.

[L. S.] A. M. COZZENS.

In presence of—
SAMUEL E. LYON.

NEW YORK, *May 11th*, 1867.

The New York Guaranty and Indemnity Company have this day advanced me fifty thousand dollars on the note of the New York Kerosene Oil Company, which amount is secured by this bond.

$50,000.

A. M. COZZENS.

NEW YORK, *May 18th*, 1867.

The New York Guaranty and Indemnity Company have this day advanced me twenty-five thousand dollars on the note of New York Kerosene Oil Company, which amount is secured by this bond.

$25,000.

A. M. COZZENS.

NEW YORK, *June 22d*, 1867.

296 The New York Guaranty and Indemnity Company have this day advanced me twenty-five thousand dollars on oil, which amount is secured by this bond.

A. M. COZZENS.

(Endorsed:) Abraham M. Cozzens to the New York Guaranty and Indemnity Company. Bond.

Defendant's Ex. C, marked for identification.

NEW YORK, *June 22d*, 1867.

Received on storage from A. M. Cozzens, in store tanks of the N. Y. Kerosene Oil Co., Hunter's Point, Long Island, subject to order of the

New York Guaranty and Indemnity Company, ten thousand barrels, of 40 gallons each, of crude petroleum oil, in bulk in tanks.

The better to facilitate A. M. Cozzens in obtaining advances on the above named property, we have taken his agreement to pay our charges thereon, including (so far as such expense may be incurred by us) and in consideration of such agreement, and in further consideration of one dollar to us in hand paid by the New York Guaranty and Indemnity Company, the receipt whereof is hereby acknowledged, we agree to deliver said property to said New York Guaranty and Indemnity Company, or order, free from any charges.

A. M. COZZENS,
Pres't of N. Y. Kerosene Oil Co.

[5 cent stamp.]

Def't's Ex. D.

Invoice of crude petroleum oil confided to the management, custody and charge of the New York Guaranty and Indemnity Company, under advances made by them, and for sale pursuant to argeement this day entered into with them.

297 NEW YORK, *June 22nd*, 1867.

10,000 bbls. crude petroleum oil of 40 gals. each, in bulk in tanks at Hunter's Point, $1—$40,000.

A. M. COZZENS.

Def't's Ex. E, February 4th, '73, W. H. P.

$25,000.] NEW YORK, 20 *June*, 1867.

Sixty days after date the New York Kerosene Oil Works promise to pay, to the order of Mess. Cozzens & Co., twenty-five thousand dollars, for value received.

A. M. COZZENS,
President.

(Endorsed:) Cozzens & Co. Waiving demand and notice of protest. Cozzens & Co.

[Int. rev. stamp, five dollars. June 20, 1867. C. & Co.]
[Int. rev. stamp, five dollars. June 20, 1867. C. & Co.]
[Int. rev. stamp, two dollars and a half. June 20, 1867. C. & Co.]

Def't's Ex. F, February 4th, '73, W. H. P.

$50,000.] NEW YORK, *July* 13, 1867.

Sixty days after date the New York Kerosene Oil Company promise to pay, to the order of Cozzens & Co., fifty thousand dollars, value received.

A. M. COZZENS,
Pres. N. Y. Keros. Oil Co.

[Int. rev. stamp, $25.00.]

(Endorsed:) Demand payment and protest waived. Cozzens & Co.

298 $50,000.] NEW YORK, *Feb. 15th*, 1867.

Sixty days *days* after date we promise to pay, to the order of Cozzens & Co., fifty thousand dollars, at value received.

A. M. COZZENS,
President N. Y. K. Co.

[Rev. stamp cancelled.]

No. Due,

(Endorsed:) Bills payable. $50,000. May, '67. Cozzens & Co. Waiving demand and notice of protest. Cozzens.

299 *Deft's Ex. G, February 5th, 1873, W. H. P.*

NEW YORK GUARANTY AND INDEMNITY COMPANY.

$50,000.] NEW YORK, 11*th January*, 1868.

Having confided to the management, custody, and charge of the New York Guaranty and Indemnity Company the following described property belonging to me, viz, the New York Kerosene Oil Company's note, dated 13th July, 1867, for fifty thousand dollars, this advance being a continuance of that made 13th July last, maturing this date, by renewal 13th Nov. last; and that company having advanced to me upon the same the sum of fifty thousand dollars, I do, in consideration thereof, hereby agree with the said company to refund said advance, with interest at the rate of seven per cent. per annum, within thirty days from the date hereof, and that for such advance and interest, together with the commissions and charges hereinafter mentioned, as well as for all other sums due or owing, or to become due or owing to the said company from me, the said company shall have a lien prior to all other claims upon the said property and the proceeds thereof; that the said property has been confided to said company, subject to the conditions printed on the other side, and which form a part of this agreement, and that the commissions of the said company, upon a sale thereof, shall be 2½ per cent. upon its gross proceeds. But if no such sale shall be made by the said company, and the advances shall be refunded and the property withdrawn from its custody, the compensation of the said company for all management and charge of the said property whilst in its custody, shall be three-quarters per cent. upon the amount of such advance over and above all disbursements made by the said company on account of the said property which, in any event, are to be paid.

Coms. and int. paid to maturity.

A. M. COZZENS.

[5c. revenue stamp, A. M. C., cancelled Jan. 11th, 1868]

300 *Conditions referred to in the instrument on the other side.*

1. The New York Guaranty and Indemnity Company shall not be liable for any loss or injury resulting from depreciation, or from any other cause than the gross negligence of the company or agents, which may happen to the property mentioned in the instrument on the other side whilst in its custody.

2. At, or at any time after, the expiration of the period fixed for the payment of the advance, if it remained unpaid the company may, in its discretion, or the discretion of its president, sell the property at public or private sale, without notice to the owner, and receive its proceeds, which are to be applied, in the first place, to the payment in full of whatever may then be due to the company upon it. Until such sale shall be made and collected, or the advance paid, interest and pro rata commission shall be charged.

3. In case of a deficiency of such proceeds it is to be made good by the party receiving the advance upon the demand and immediately after such sale; and if there be a surplus it is to be immediately accounted or and paid over to the party signing this contract or order.

4. If at any time before the period fixed for the payment of the advance the market value of the property should be so reduced as not to afford to the company at the time being a margin of security for the payment of its advance of at least twenty per cent., additional property to make up such margin shall within two days after its being required be deposited with the company. And if default be made in that respect the amount of such advance may immediately thereupon, at the option of the company, or its president, become due and collectable as if the period for its limited payment had expired, and the company may immediately proceed as provided in the second article.

5. In case of any fraud, misrepresentation, or concealment in regard to the ownership or character of the property or securities, the company is entitled, under section seven of its charter, to sell the property immediately to reimburse the advance, with interest, cost, and charges, and the party or parties signing the within agreement will be held liable for any deficiency.

301 *Def't's Ex. H, February 5th*, 1873, *W. H. P.*

NEW YORK GUARANTY AND INDEMNITY COMPANY.

$25,000.] NEW YORK, *22d August*, 1867.

Having confided to the management, custody, and charge of the New York Guaranty and Indemnity Company the following described property belonging to me, viz: One note of the New York Kerosene Oil Company, dated 20th June, 1867, for twenty-five thousand dollars; and that company having advanced to me upon the same the sum of twenty-five thousand dollars, I do, in consideration thereof, hereby agree with the said company to refund said advance, with interest at the rate of seven per cent. per annum, within sixty days from the date hereof, and that for such advance and interest, together with the commissions and charges hereinafter mentioned, as well as for all other sums due or owing, or to become due or owing to the said company from me, the said company shall have a lien prior to all other claims, upon the said property and the proceeds thereof; that the said property has been confided to the said company, subject to the conditions printed on the other side, and which form a part of this agreement; and that the commissions of the said company, upon the sale thereof, shall be two per cent. upon its gross proceeds. But if no such sale shall be made by the said company, and the advances shall be refunded, and the property withdrawn from its custody, the compensation of the said company for all management and charge of the said property whilst in its custody, shall be one and one-half per cent. upon the amount of such advance over and above all disbursements made by the said company on account of the said property which, in any event, are to be paid.

Interest and coms. paid 22d Aug., 1867.

A. M. COZZENS.

(Conditions precisely similar to Exhibit G.)

[5c. revenue stamp, Aug. 22, 1867. Cancelled. N. Y. G. & I. Co.]

(Across the face, in red:) This advance is a continuation of that made 18th May, 1867, which was renewed to this date on the 20th June, 1867.

A. M. COZZENS.

Cancelled.

302 *Def't's Ex. I, February 5th, 1873, W. H. P.*

NEW YORK GUARANTY AND INDEMNITY COMPANY.

$25,000.] NEW YORK, 20*th December*, 1867.

Having confided to the management, custody, and charge of the New York Guaranty and Indemnity Company the following-described property belonging to me, viz: One note of the New York Kerosene Oil Company, dated 20th June, 1867, for twenty-five thousand dollars; and that company having advanced to me upon the same the sum of twenty-five thousand dollars, I do, in consideration thereof, hereby agree with the said company to refund said advance, with interest at the rate of seven per cent. per annum, within sixty days from the date hereof, and that for such advance and interest, together with the commissions and charges hereinafter mentioned, as well as for all other sums due or owing, or to become due or owing to the said company from me, the said company shall have a lien prior to all other claims, upon the said property and the proceeds thereof; that the said property has been confided to the said company, subject to the conditions printed on the other side, and which form a part of this agreement; and that the commissions of the said company, upon a sale thereof, shall be 2½ per cent. upon its gross proceeds. But if no such sale shall be made by the said company, and the advances shall be refunded, and the property withdrawn from its custody, the compensation of the said company for all management and charge of the said property whilst in its custody, shall be one and one-half per cent. upon the amount of such advance over and above all disbursements made by the said company on account of the said property which, in any event, are to be paid.

A. M. COZZENS.

(Conditions precisely similar to Ex. G.)

[5c. revenue stamp. Cancelled. Dec. 20, 1867.]

(Across the face, in red:) This advance is a continuance of that made 18th May, 1867.

A. M. COZZENS.

303 *Def't's Ex. K, February 5th, 1873, W. H. P.*

NEW YORK GUARANTY AND INDEMNITY COMPANY.

$25,000.] NEW YORK, 18 *December*, 1867.

Having confided to the management, custody, and charge of the New York Guaranty and Indemnity Company the following described property belonging to me, viz: Ten thousand barrels crude petroleum oil, in bulk, contained in tanks in N. Y. Kerosene Oil Co.'s store, Hunter's Point, L. I., and that company having advanced to me upon the same the sum of twenty-five thousand dollars, I do, in consideration thereof, hereby agree with the said company to refund said advance, with interest at the rate of seven per cent. per annum, within sixty days from the date hereof, and that for such advance and interest, together with the commissions and charges hereinafter mentioned, as well as for all other sums due or owing, or to become due or owing to the said company from me, the said company shall have a lien prior to all other claims, upon the said property and the proceeds thereof; that the said property has been confided to the said company, subject to the conditions printed on

the other side, and which form a part of this agreement; and that the commissions of the said company, upon a sale thereof, shall be 2½ per cent. upon its gross proceeds. But if no such sale shall be made by the said company, and the advances shall be refunded, and the property withdrawn from its custody, the compensation of the said company for all management and charge of the said property whilst in its custody shall be one and one-half per cent. upon the amount of such advance over and above all disbursements made by the said company on account of the said property which, in any event, are to be paid.

A. M. COZZENS.

(Conditions precisely similar to Ex. G.)

[5c. revenue stamp. Cancelled.]

(Across the face:) A. M. Cozzens.

DEF'T'S EXHIBIT L, FEB. 12, '73.

Register of advances and securities, New York Guaranty and Indemnity Company.

Number.	Date of advance.	Due.	Consignor.	Quantity.	Quality or brand.	Article.	Cash value.	Advanced value.	Rate of commission.	Amount advanced.	Am't insured.	Name of warehouseman.	Location of warehouse.	Remarks.
	1867.													
1317	Feb. 15, 60 days	Ap'l 16	Cozzens & Co.	N. Y. Kerosene Oil Co.		Note..... $50 M.	$50,000	.....	Paid 1½.....	$50,000	.....	.....	.....	Renewed Ap'l 16
1611	April 16.		Cozzens & Co.	N. Y. Kerosene Oil Co.		Note and mortgage.	.....	.....	¾p'r c't p'r mo. Int. and com. paid to 1½	$50,000	.....	.....	.....	Renewed May 18
1722	May 11, 63 days.	July 13	A. M. Cozzens	.....		Note.....	.....	.....	Maturity	$50,000	.....	.....	.....	Renewed July 13
1744	May 18, 33 days.	June 20	A. M. Cozzens	.....		Note.....	.....	.....	Int. and com. paid to ¾ Maturity	$25,000	.....	.....	.....	Renewed June 20

DEF'T'S EXHIBIT M, FEB. 12, 1873.

Register of advances and securities, New York Guaranty and Indemnity Company.

No.	Date.	Advanced.	Time.	Com's.	When due.	Amount.	Collaterals.	Value.	Substitutions.	Value.	Warehouse.	Remarks.
	1867.			Com. & in. paid.			Note of the N. Y. Kerosene Oil Co., June 20, 60 days,					
84	June 20	A. M. Cozzens..	63	1½	Aug. 22	$25,000	$25,000	.....	.....	.....	.....	Renewed Aug. 22, 1867
94	June 22	A. M. Cozzens..	60	1½	Aug. 21	$25,000	10,000 B. crude petroleum.	.....	.....	.....	N. Y. Kerosene Oil Co.	Renewed Aug. 21, 1867
185	July 13	A. M. Cozzens..	63	1½	Sept. 14	$50,000	Note of N. Y. Kerosene Oil Co., $50, M.					Renewed Sept. 14, 1867
294	Aug. 21	A. M. Cozzens..	60	1½	Oct. 20	$25,000	10,000 B. crude petroleum...	.....	.....	.....	June 22. N. Y. Kero-	Renewed Oct. 19, 1867
297	Aug. 22	A. M. Cozzens..	60	1½	Oct. 21	$25,000	Note of the N. Y. Kerosene Oil Co., June 20, 60 days, $25,000.	.....	.....	.....	sene Oil Co.....	Renewed Oct. 21, 1867
368	Sept. 14	A. M. Cozzens..	60	1½	Nov. 13	$50,000	Note of the N. Y. Kerosene Oil Co., 13th July, 60 days, $50,000.	.....	.....	.....	.....	Renewed Nov. 13
532	Oct. 19	A. M. Cozzens..	60	1½	Dec. 18	$25,000	10,000 B. crude petroleum...	.....	.....	.....	June 22, 1867, N. Y.	Renewed Dec. 18
552	Oct. 21	A. M. Cozzens..	60	1½	Dec. 20	$25,000	June 20, 1867, A. M. Cozzens, pres., $25,000.	.....	.....	.....	Kerosene Oil Co.....	Renewed Dec. 20
722	Nov. 13	A. M. Cozzens..	60	1½	Jan. 12	$50,000	Note N. Y. Kerosene Oil Co., July 13, 60 days, $50,000.	.....	.....	.....	.....	Renewed Jan. 11
933	Dec. 18	A. M. Cozzens..	60	1½	Feb. 16	$25,000	10,000 B. petroleum.....	.....	.....	.....	.....	Charged in acc't
952	Dec. 20	A. M. Cozzens..	60	1½	Feb. 18	$25,000	Note of N. Y. Kerosene Oil Co.	.....	.....	.....	.....	Charged to acc't
	1868.											
1102	Jan. 11	A. M. Cozzens..	30	¾	Feb. 10	$50,000	Note $50,000.....	.....	.....	.....	.....	Charged to acc't

305 *Def't's Exhibit, Feb.* 5, 1873.

We, the undersigned, stockholders in the amounts set opposite our names respectively in the New York Kerosene Oil Company, a manufacturing company, formed under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, and the several acts amendatory thereof, owning more than two-thirds of the capital stock of said corporation, do hereby assent to the mortgaging by said company of all its real estate situated in the county of Queens, to the New York Guaranty and Indemnity Company, in the sum of one hundred thousand dollars, with interest thereon, to secure the payment of debts contracted or to be contracted in the business for which said New York Kerosene Oil Company was incorporated.

Dated New York, April 27th, 1867.

Names of stockholders.	No. of shares.	Amount.
Abraham M. Cozzens....	Four thousand nine hundred and thirty-eight shares.....	$493, 800

STATE OF NEW YORK,
City and County of New York, ss:

On this twenty-seventh day of April, in the year eighteen hundred and sixty-seven, before me personally came Abraham M. Cozzens, to me known to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

S. L. OGDEN,
Notary Public, New York County.

A true copy as filed April 29th, 1867, and recorded May 11, 1867.

J. T. HEGEMAN,
Clerk of Queens Co.

306 (Endorsed:) Read in evidence Feb'y 5, 1873; see page 72 of minutes. New York Kerosene Oil Company with the New York Guaranty and Indemnity Company.

Def't's Exhibit A, January 24, 1873.

At a meeting of the trustees of the New York Kerosene Oil Company held at the office of the company, No. 134 Pearl street, on the 9th of March, 1867, a sufficient number of said trustees being present to constitute a quorum according to the by-laws of said company, the following resolution was adopted, viz:

On motion, it was resolved that the president be authorized to execute a mortgage for the sum of one hundred thousand dollars on their factory and works, situate at Newtown Creek, in Newtown, Queens County, and to affix the official seal of said corporation thereto.

{ NEW YORK KEROSENE OIL CO. SEAL. }

G. W. AUSTEN,
Sec'y.

[Five cent stamp.]

STATE OF NEW YORK,
City and County of New York, ss :

On this nineteenth day of April, in the year one thousand eight hundred and sixty-seven, before me personally came George W. Austen, secretary of the New York Kerosene Oil Company, to me personally known, who being by me duly sworn, did depose and say that he resided in the city of New York ; that he is the secretary of the said New York Kerosene Oil Company ; that the seal affixed to the foregoing instrument is the corporate seal of said company ; that it was affixed thereto by order of the board of directors of said company, and that he subscribed his name thereto by like authority.

T. L. OGDEN,
Notary Public, New York County.

307 *Def't's Exhibit No.* 1, *Jan.* 28, 1873.

BOOK OF MINUTES OF THE NEW YORK KEROSENE OIL COMPANY.

At a meeting of the trustees of the New York Kerosene Oil Company, held July 20th, 1860, at the office of the company, No. 89 Water st., the following gentlemen were present, viz: A. M. Cozzens, Eli Kelly, Abram S. Hewitt, John A. Appleton.

A certified copy of the certificate of organization of the company was presented, and ordered on file.

On motion, Mr. Eli Kelly was appointed chairman, temporarily.

On motion, Edward Cooper was unanimously elected president of the company; John A. Appleton was unanimously elected treasurer; and Geo. W. Austen was unanimously elected secretary for the ensuing year.

A subscription to stock in the company was presented, as follows:

The undersigned respectively subscribe for the number of shares, of one hundred dollars each, of the capital stock of the New York Kerosene Oil Company set opposite to their respective signatures hereto, and agree to pay for the same as called for by the company.

Edward Cooper, thirty-two	$3,200
A. M. Cozzens, sixty shares	6,000
Eli Kelly, sixty-five shares	6,500
Wm. H. Appleton, thirty-three shares	3,300
Abram S. Hewitt, thirty shares	3,000
John A. Appleton, thirty shares	3,000
	$25,000

On motion, the whole amount of the preceding subscriptions was called in to be paid in cash, and thereupon the above-named subscribers paid to the treasurer the amount of their respective subscriptions, and certificates for the stock were directed to be issued to them accordingly.

A proposition was submitted to sell to this company the real estate and appurtenances, buildings, machinery, fixtures, manufactory and works formerly belonging to the North American Kerosene Gas Light Company, with the right of that company in the trade mark, or
308 use of the word "kerosene," as conveyed by Philo T. Ruggles, receiver of that company, to Eli Kelly, Edward Cooper, Abram S. Hewitt, and John A. Appleton, by deed dated June 11th, 1860, recorded in Queens County, embracing all that was conveyed by that deed, and

likewise the gore adjoining said premises conveyed by Neziah Bliss and Samuel Sneden and their wives to Eli Kelly by deed dated June 19th, 1860, recorded in Queens County, together with all the right, title, and interest heretofore of the "North American Kerosene Gas Light Company," and now belonging to said Kelly, Cooper, Hewitt, and Appleton, or either of them, in all patents or processes, or machinery for making oil from coal or other substances, for the aggregate price of three hundred and fifty thousand dollars, payable in thirty-five hundred shares of one hundred dollars each of the full-paid capital stock of this company, which proposition was unanimously accepted, and it was ordered that upon conveyance of said property to the company, the said amount of $350,000 of stock be issued to the said Eli Kelly, Edward Cooper, Abram S. Hewitt, and J. A. Appleton, respectively, in such proportions to each as they shall request.

A proposition was submitted to sell to this company the stock of Boghead coal, comprising about ten thousand tons, now lying at Newtown Creek, at or near the works purchased by the company as above, which was recently purchased by Augustine Smith from Messrs. Hagerty & Co., Theo. Dehon, and Brewer & Caldwell, together with the oil now at said works, and the horses, carts, acids, and other material and apparatus now at the above-mentioned works, for the price in the aggregate of one hundred and twenty five thousand dollars, payable in twelve hundred and fifty shares of $100 each of the full paid capital stock of this company, to be issued to Eli Kelly, A. M. Cozzens, John A. Appleton, Edward Cooper, Abram S. Hewitt, the owners of such property.

The proposal was unanimously accepted, and stock to the above-mentioned amount of one hundred and twenty five thousand dollars was directed to be issued to the above-named parties in such proportions to each as they may respectively require upon transfer of such property to this company.

On motion, the treasurer was directed to open the bank account of the company in the Seventh Ward Bank.

On motion, resolved, That Mr. Cozzens be authorized to employ
309 such persons as may be necessary to carry on the works, and to make such purchases of materials as may be proper to carry on the manufacture of oil.

On motion, resolved, That the president, treasurer, and secretary receive no salaries for their services as such.

On motion, resolved, That the treasurer be authorized to pay any such bills as may be certified by Mr. Cozzens, and that he present at the monthly meetings of the board a trial balance of the books, a cash account, and the vouchers for the payments made by him.

On motion, resolved, That three members of this board be a quorum for the transaction of business.

On motion, resolved, That it shall be the duty of the secretary to call a meeting of the board at the request of any trustee.

On motion, resolved, That the President and Mr. Cozzens be directed to have the new still-house completed as early as possible.

On motion, resolved, That the secretary shall call the regular monthly meetings whenever the treasurer shall notify him that he is ready to present his monthly statements, and that such meeting shall be called prior to the 10th day of each month.

On motion, the board adjourned.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *Sept. 12th*, 1860.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: Edward Cooper, A. S. Hewitt, A. M. Cozzens, Eli Kelley.

The minutes of the last meeting were read and approved.

There being no business before the board, it adjourned until the September meeting.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *November 5th*, 1860.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: Edward Cooper, A. S. Hewitt, A. M. Cozzens, W. H. Appleton.

310 On motion, resolved, That the treasurer be directed to charge up all the money expended on construction to the cost of making oil, and to render with each balance sheet a memorandum estimate of the total amount of money expended on construction to the date of the balance sheet.

The board then adjourned.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *Dec. 10th*, 1860.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: Edward Cooper, A. S. Hewitt, W. H. Appleton, Eli Kelly.

On motion, the board adjourned to meet on the 2d of January, 1861.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *Jan'y 2d*, 1861.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, forming a quorum, viz: Edward Cooper, A. S. Hewitt, W. H. Appleton, J. A. Appleton, Eli Kelly.

On motion of A. S. Hewitt, resolved, That a dividend of ten per cent. on the capital stock of the company be, and is hereby declared, payable this day in cash.

NEW YORK, *January 2nd*, 1861.

Rec'd from the New York Kerosene Oil Co. the sums placed opposite our names respectively, the same being a dividend of ten per cent. (10) on the stock held by each of us, and in accordance with foregoing resolution.

Edward Cooper	273	shares	2,730	dolls.	Edward Cooper.
A. S. Hewitt	273	"	2,730	"	Abram S. Hewitt.
Cozzens & Co.	2,449	"	24,490	"	Cozzens & Co., J. E. Kelly, att'y.
Eli Kelly	65	"	650	"	Eli Kelly.
W. H. Appleton	1,216	"	12,160	"	Wm. H. Appleton.
J. A. Appleton	30	"	300	"	John A. Appleton.
Peter Cooper	694	"	6,940	"	P. Cooper, by A. S. Hewitt.
	5,000	shares.	$50,000		

G. W. AUSTEN, *Sec'y.*

311 NEW YORK, *Feb'y 11th*, 1861.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: E. Cooper, A. S. Hewitt, J. S. Appleton, Eli Kelly.

There being no special business before the board, it adjourned to meet at the next regular meeting, to be held in March.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *March 11th*, 1861.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: E. Cooper, A. S Hewitt, Eli Kelly, J. A. Appleton.

On motion of A. S. Hewitt, the secretary was instructed to write to Messrs. Gow & Co., of Glasgow, to sell any Boghead coal remaining on hand, not shipped, at such prices as would, if possible, give a profit to the Kerosene Oil Company, and if a profit could not be obtained, to sell at such prices as would reimburse to the company all costs and charges.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *April 10th*, 1861.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: W. H. Appleton, J. A. Appleton, A. S. Hewitt, E. Cooper, E. Kelly.

The board adjourned to meet on 10th May.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *May 10th*, 1861.

312 At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: W. H. Appleton, J. A. Appleton, A. S. Hewitt.

A quorum not being present, the meeting was adjourned to 10th June next.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *June 10th*, 1861.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: Edward Cooper, A. M. Cozzens, A. S. Hewitt, Eli Kelly, Jno. A. Appleton.

The minutes of the last meeting were read and approved.

Communications from J. B. Cozzens, sup't, D. E. Austen and G. W. Head, applying for additions to their salaries, were presented.

On motion of A. S. Hewitt,

Resolved, That the applications of Messrs. Cozzens, Austen, and Head be laid on the table for the present, and that the Secretary be instructed to inform the applicants that the board is desirous of meeting their views, but owing to the unsettled state of affairs do not at present deem an advance of salaries expedient, but will, so soon as the fall business shall develop itself favorably, entertain the applications with a view of making such arrangements as will prove satisfactory.

G. W. AUSTEN, *Sec'y.*

Meeting of stockholders.

NEW YORK, *July 20th*, 1861.

At the annual meeting of the stockholders of the New York Kerosene Oil Company, held this day pursuant to notice, at the office of the company, for the purpose of choosing trustees for the ensuing year, the following stockholders were present, viz: A. S. Hewitt, A. M. Cozzens, Eli Kelly, J. A. Appleton.

313 On motion of A. S. Hewitt, Eli Kelly was chosen chairman of the meeting, and G. W. Austen was appointed secretary.

Mr. Kelly announced to the stockholders that the meeting was called for the purpose of electing trustees for the ensuing year.

On motion of A. S. Hewitt, Jas. E. Kelly and D. Austen, jr., were chosen inspectors of the election.

The polls were then declared open.

After balloting, the inspectors of election presented their certificate, a copy of which is hereto annexed.

(Copy.)

We, the undersigned inspectors of an election for trustees of the New York Kerosene Oil Company, held this day at 89 Water st., do hereby certify that the following gentlemen each received 2,817 votes, viz: Edward Cooper, A. S. Hewitt, Eli Kelly, A. M. Cozzens, W. H. Appleton, and J. A. Appleton, and that 2,817 votes in all were cast.

(Signed) JAS. E. KELLY.
D. AUSTEN, JR.

The chairman then announced that Edward Cooper, A. S. Hewitt, Eli Kelly, A. M. Cozzens, W. H. Appleton, and J. A. Appleton were duly elected for the year next ensuing.

The meeting then adjourned.

G. W. AUSTEN,
Sec'y of Stockholders' Meeting.

NEW YORK, *July 20th*, 1861.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: Eli Kelly, A. M. Cozzens, A. S. Hewitt, J. A. Appleton. On motion of A. M. Cozzens, Eli Kelly was appointed chairman and G. W. Austen was appointed secretary of the meeting.

Mr. Kelly announced that the meeting was called for the purpose of electing officers for the year next ensuing.

The inspectors' certificate of election of trustees was read, and ordered on file.

The board then proceeded to elect officers for the next year.

314 On motion of A. M. Cozzens, Edward Cooper was elected president, and John A. Appleton was elected treasurer for the ensuing year.

On motion of A. S. Hewitt, G. W. Austen was elected secretary for the ensuing year.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *Dec. 10th*, 1862.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were

present, viz: E. Cooper, A. S. Hewitt, J. A. Appleton, Eli Kelly, A. M. Cozzens.

On motion, resolved that the salary of the employes at the works be raised as follows:

J. B. Cozzens, sup't, from Sep., '61, to $2,000 per annum.
D. E. Austen " to 1,500 "
G. W. Head " to 1,000 "

and that an additional sum of $300 be paid to J. B. Cozzens, sup't, from 1 Sep., '60, to 1 Sep., '61.

G. W. AUSTEN, *Sec'y.*

Copy of the minutes of a meeting of the stockholders of the N. Y. Kerosene Oil Company, held July 21st, 1862.

NEW YORK, *July 21st*, 1862.

At the annual meeting of the stockholders of the New York Kerosene Oil Company, held this day, pursuant to notice, at the office of the company, for the purpose of electing trustees for the ensuing year, the following stockholders were present, viz: A. S. Hewitt, W. H. Appleton, J. A. Appleton, Eli Kelly, A. M. Cozzens.

On motion of A. M. Cozzens, Eli Kelly was chosen chairman of the meeting, and G. W. Austen was appointed secretary.

The chairman announced to the stockholders that the meeting was called for the purpose of electing trustees for the ensuing year.

On motion of A. S. Hewitt, C. L. Wheeler and D. Austin, jr., were chosen inspectors of the election to be held.

315 The chairman then declared the poll to be open.

After balloting, the inspectors or election presented their certificate, a copy of which is as follows:

(Copy.)

We, the undersigned inspectors of an election for trustees of the New York Kerosene Oil Company, held this day at 89 Water st., do hereby certify that the following gentlemen each received 5,000 votes, viz.: Edward Cooper, A. S. Hewitt, Eli Kelly, A. M. Cozzens, W. H. Appleton and J. A. Appleton, and that 5,000 votes in all were cast.

(Signed) C. L. WHEELER,
D. AUSTEN, JR.,
Inspectors of Election.

The chairman then declared that E. Cozzens, A. S. Hewitt, Eli Kelly, A. M. Cozzens, W. H. Appleton and J. A. Appleton had been duly elected trustees for the year ensuing.

On motion of A. S. Hewitt the meeting adjourned.

G. W. AUSTEN,
Sec'y of Stockholders' Meeting.

NEW YORK, *July 21st*, 1862.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: Eli Kelley, A. S. Hewitt, A. M. Cozzens, W. H. Appleton, J. A. Appleton.

On motion of A. M. Cozzens, Eli Kelly was appointed chairman, and G. W. Austen was appointed secretary of the meeting.

Mr. Kelly, the chairman, stated that the meeting had been called for the purpose of electing officers for the year ensuing.

The inspectors' certificate of election of trustees was read to the meeting, and on motion was ordered on file.

The trustees then proceeded to elect officers for the year ensuing.

On motion of A. M. Cozzens, Edward Cooper was elected president, and John A. Appleton was elected treasurer for the ensuing year.

On motion of A. S. Hewitt, G. W. Austen was elected secretary for the ensuing year.

On motion the meeting then adjourned.

G. W. AUSTEN, *Sec'y.*

316 NEW YORK, *Mar. 10th*, 1863.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: E. Cooper, A. S. Hewitt, A. M. Cozzens, J. A. Appleton, W. H. Appleton.

On motion the meeting adjourned to Friday, 13th Mar., at same place.

G. W. AUSTEN, *Sec'y.*

At a meeting of the trustees of the New York Kerosene Oil Company, held on the 13th of March, 1863, at the office of the company, the following gentlemen were present, viz: A. S. Hewitt, A. M. Cozzens, J. A. Appleton, W. H. Appleton.

On motion, Resolved, That the money in hand be invested in petroleum at not over $1 per bbl. at the well, and stored in the tanks for future disposition.

Resolved, That Mr. Cozzens be authorized to say to Mr. Heye that the company will sell the works (exclusive of the personal property) for $150,000, provided they are not otherwise disposed of or withdrawn from the market before his decision is received, this offer not to stand open longer than three months.

G. W. AUSTEN, *Sec'y.*

MAR. 13TH, 1863.

Copy of the minutes of a meeting of the stockholders of the New York osene Oil Company, held at 89 Water st., on July 21st, 1863.

NEW YORK, *July 21st*, 1863.

At the annual meeting of the stockholders of the New York Kerosene Oil Company, held this day pursuant to notice, at the office of the company for the purpose of electing trustees for the ensuing year, the following stockholders were present, viz: A. S. Hewitt, E. Cooper, A. M. Cozzens.

317 On motion of A. M. Cozzens, A. S. Hewitt was chosen chairman of the meeting, and G. W. Austen was chosen secretary.

The chairman announced to the stockholders present that the meeting had been called for the purpose of electing trustees for the ensuing year.

On motion of Edward Cooper, David Austen, jr., and G. W. Austen, were chosen as inspectors of the election to be held.

The chairman then declared the poll to be open.

After balloting, the inspectors of election presented their certificate a copy of which is as follows:

(Copy.)

We, the undersigned inspectors of an election for trustees of the New York Kerosene Oil Company, held this day at the office of said company, No. 89 Water street, do hereby certify that the following gentlemen each received 3,754 votes, viz: E. Cooper, A. S. Hewitt, Eli Kelley, A. M. Cozzens, W. H. Appleton, and J. A. Appleton, and that 3,754 votes in all were cast.

(Signed) G. W. AUSTEN,
D. AUSTEN, JR.,
Inspectors of Election.

JULY 21, '63.

The chairman then declared that E. Cooper, A. S. Hewitt, Eli Kelley, A. M. Cozzens, W. H. Appleton, and J. A. Appleton to be duly elected for the year ensuing.

On motion of A. M. Cozzens, the meeting then adjourned.

G. W. AUSTEN,
Sec'y of Stockholders' Meeting.

NEW YORK, *October 10th*, 1863.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: Eli Kelly, A. M. Cozzens, E. Cooper, Wm. H. Appleton, J. A. Appleton.

On motion of A. M. Cozzens, Eli Kelly was appointed chairman, and G. W. Austen was appointed secretary of the meeting.

The chairman, Mr. Kelly, stated that the meeting had been called for the purpose of electing officers for the year ending July 21st, 1864.

318 The inspectors' certificate of election for trustees was read to the meeting, and on motion was ordered to be filed.

The trustees then proceeded to elect officers for the year ensuing.

On motion of A. M. Cozzens, Edward Cooper was elected president, John A. Appleton was elected treasurer, and Geo. W. Austen was elected secretary for the year ending 21st July, 1864.

On motion, the meeting then adjourned.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *April 25th*, 1864.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: A. M. Cozzens, Wm. H. Appleton, J. H. Appleton, A. S. Hewitt, E. Cooper.

On motion of A. S. Hewitt, Resolved, That the real and personal property of the company be exposed for sale at auction, on the 15th day of June next, and that the secretary be and he is hereby instructed to prepare the necessary advertisements, and to get ready a schedule of the property to be offered for sale.

G. W. AUSTEN, *Sec'y.*

Copy of the minutes of a meeting of the stockholders of the New York Kerosene Oil Company, held at 207 Pearl st., on 21st July, 1864.

NEW YORK, *July 21st*, 1864.

At the annual meeting of the stockholders of the New York Kero-

sene Oil Company, held this day pursuant to notice, at the office of the company, for the purpose of electing trustees for the ensuing year, the following stockholders were present, viz: James E. Kelly, A. M. Cozzens, C. L. Wheeler, G. W. Austen.

On motion of A. M. Cozzens, Jas. E. Kelly was chosen chairman, and Geo. W. Austen was chosen secretary of the meeting.

Mr. Kelly then announced to the stockholders present that
319 the meeting had been called for the purpose of electing trustees for the ensuing year.

On motion of A. M. Cozzens, Edward R. Bell and David E. Austen were appointed inspectors of the election to be held.

The chairman then declared the poll to be open.

After balloting, the inspectors of election presented their certificate, a copy of which follows.

(Copy.)

We, the undersigned, inspectors of an election for trustees of the New York Kerosene Oil Company, held this day at the office of said company, No. 207 Pearl st., do hereby certify, that 3,633 votes in all were cast, and that the following gentlemen, viz. Eli Kelly, A. M. Cozzens, F. H. Cozzens, Jas. E. Kelly, C. L. Wheeler, and G. W. Austen, each received 3,633 votes.

E. R. BELL AND
D. E. AUSTEN,
Inspectors.

July 21, 1864.

The chairman then declared that Eli Kelly, A. M. Cozzens, F. H. Cozzens, Jas. E. Kelly, C. L. Wheeler, and G. W. Austen to have been duly elected for the ensuing year.

On motion of A. M. Cozzens, the meeting adjourned.

G. W. AUSTEN,
Sec'y of Stockholders' Meeting.

NEW YORK, *July 21st*, 1864.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: James E. Kelly, A. M. Cozzens, C. L. Wheeler, G. W. Austen.

On motion of A. M. Cozzens, James E. Kelly was appointed chairman, and G. W. Austen was appointed secretary of the meeting.

The chairman stated that the meeting had been called for the purpose of electing officers for the year ending July 21st, 1865.

The inspectors' certificate of election for trustees was read to the meeting, and on motion was ordered to be filed.

The meeting then proceeded to elect officers for the year ensuing.

On motion of C. L. Wheeler, A. M. Cozzens was elected president and G. W. Austen was elected secretary and treasurer for the year ending July 21st, 1865.

On motion the meeting then adjourned.

G. W. AUSTEN, *Sec'y.*

320 *Copy of the minutes of a meeting of the stockholders of the New York Kerosene Oil Company, held at 207 Pearl st., on 4th of August, 1865, pursuant to notice and postponed from 21st July, 1865.*

NEW YORK, *August 4th*, 1865.

At the annual meeting of the stockholders of the New York Kerosene Oil Company, held this day pursuant to notice, at the office of the company, No. 207 Pearl st., for the purpose of electing trustees for the year from 21st July, 1865, the following stockholders were present, viz: A. M. Cozzens, F. H. Cozzens, Geo. W. Austen.

On motion of A. M. Cozzens, F. H. Cozzens was chosen chairman, and Geo. W. Austen was chosen secretary of the meeting.

Mr. F. H. Cozzens then announced to the stockholders present that the meeting had been called for the purpose of electing trustees for the year commencing 21st July, 1865.

On motion of A. M. Cozzens, Edward C. Cozzens and Samuel Bretzfeld were appointed inspectors of the election to be held.

The chairman then announced that the poll was open.

After balloting, the inspectors of election presented their certificate, a copy of which follows.

(Copy.)

We, the undersigned, inspectors of an election for trustees of the New York Kerosene Oil Company, held this day at the office of said company, No. 207 Pearl st., do hereby certify that 3,685 votes in all were cast, and that the following gentlemen, viz, Eli Kelly, A. M. Cozzens, F. H. Cozzens, Jas. E. Kelly, C. L. Wheeler, and G. W. Austen each received 3,685 votes.

The chairman then declared that Eli Kelly, A. M. Cozzens, F. H. Cozzens, Jas. E. Kelly, C. L. Wheeler, and Geo. W. Austen to have been duly elected for the year commencing 21st July, 1865.

G. W. AUSTEN,
Sec'y of Stockholders' Meeting.

NEW YORK, *March 8th*, 1867.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: A. M. Cozzens, F. H. Cozzens, G. W. Austen.

321 Mr. A. M. Cozzens announced that the object of the meeting to be the filling of a vacancy in the board of trustees, Mr. Eli Kelly being desirous of retiring from the board.

Mr. F. H. Cozzens then presented the resignation of Mr. Eli Kelly, which was accepted.

G. W. Austen then nominated Mr. Thos. H. Cozzens to fill the vacancy.

On being balloted for, Mr. T. H. Cozzens was unanimously elected trustee in place of Mr. Eli Kelly.

The meeting then adjourned.

G. W. AUSTEN, *Sec'y.*

NEW YORK, *March 9th*, 1867.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, the following gentlemen were present, viz: A. M. Cozzens, F. H. Cozzens, G. W. Austen, Thos. H. Cozzens.

On motion, it was resolved that the President be authorized to execute a mortgage for the sum of one hundred thousand dollars on their factory and works, situate at Newtown Creek, in Newtown, Queens County, and to affix the official seal of said corporation thereto.

The meeting then adjourned.

G. W. AUSTEN, *Sec'y.*

Copy of the minutes of a meeting of the stockholders of the New York Kerosene Oil Company, held in the city of New York on the 28th day of March, 1868.

NEW YORK, *March 28th*, 1868.

At a meeting of the stockholders of the New York Kerosene Oil Company, held in the city of New York, on the 28th day of March, 1868, were present as follows, viz:

Wm. H. Appleton, executor, &c., of Abraham M. Cozzens, deceased, representing shares	3,590
James E. Kelley, executor of Eli Kelley, deceased	65
Francis H. Cozzens	51
Chas L. Wheeler	5
James E. Kelley	1
	3,712

and Jordan M. Fowler, secretary of said company.

322 The said Wm. H. Appleton, executor, &c., of the said Abraham M. Cozzens, admits due notice of this meeting on behalf of 1,286 other shares, standing in the name of A. S. Hewitt, Peter Cooper Edward Cooper, or James H. Austen, and really belonging to the estate of said Abraham M. Cozzens, being pledged to various parties for money loaned to said Cozzens, but as the same have not been transferred on the books of the company the said Wm. H. Appleton does not claim to vote on the same.

On motion Mr. James E. Kelley was appointed chairman of the meeting.

The following by-law was unanimously adopted:

Whenever a vacancy exists in the board of trustees the same shall be filled by ballot for the remainder of the year by the remaining or surviving trustees, for which purpose the vote of a majority of the whole number of trustees shall be required; but whenever the trustees shall have failed to fill such vacancy for thirty days after it occurs, or when more than one vacancy shall exist at the same time in the board of trustees the same shall be filled by ballot for the remainder of the year at a general meeting of the stockholders.

It appearing that the places of Abraham M. Cozzens and George W. Austen are vacant by death, that Francis H. Cozzens and Charles L. Wheeler have not accepted their last appointment as trustees, and that Thomas M. Cozzens was not competent to serve as trustee, never having been a stockholder in the company, it was, on motion,

Resolved, That this meeting now proceed to the election of five trustees, to hold office until the next annual meeting of the stockholders in the month of July next, and that Mr. Charles L. Wheeler be, and hereby is, appointed inspector of said election.

After balloting, the inspector of election presented his certificate, a copy of which follows:

(Copy.)

I, the undersigned, inspector of an election for trustees of the New York Kerosene Oil Company, held this day in the city of New York, do hereby certify that 3,712 votes were cast, and that the following gentlemen, viz, James E. Kelley, Ogden Haggerty, John H. Hall, John Perkins, and Francis H. Cozzens, each received 3,712 votes.

The chairman then declared that James E. Kelley, Ogden Hag-
323 gerty, John H. Hall, John Perkins, and Francis H. Cozzens have been duly elected for the balance of the year, commencing July 21, 1867.

The meeting then adjourned.

JORDAN M. FOWLER, *Sec'y.*

NEW YORK, *March 31st*, 1858.

At a meeting of the trustees of the New York Kerosene Oil Company, held this day at the office of the company, No. 134 Pearl street, the following gentlemen were present, viz: Ogden Haggerty, James E. Kelley, John Perkins, Francis H. Cozzens.

On motion, Mr. Francis H. Cozzens was appointed chairman of the meeting.

The trustees then proceeded to elect a president and treasurer for the balance of the year.

On motion, Mr. Ogden Haggerty was appointed inspector of election.

The chairman then announced that the poll was open.

After balloting, the inspector of election announced that James E. Kelley had been elected president, and John Perkins had been elected treasurer unanimously, for the balance of the year.

On motion, Jordan M. Fowler was continued secretary for balance of the year.

It being represented that application had been made for renting or otherwise making use of the company's works, it was,

Resolved, That it be referred to the president to examine that subject, and report at a future meeting the best available method for making the works productive.

It was further, on motion,

Resolved, That the president is authorized to dispose of such horses and other personal property of the company as he shall deem it necessary or advantageous to dispose of.

The meeting then adjourned.

JORDAN M. FOWLER, *Sec'y.*

NEW YORK, *April 21st*, 1868.

324 At a meeting of the trustees of the New York Kerosene Oil Company, held this day in the city of New York, the following gentlemen were present, viz: John Perkins, Ogden Haggerty, Jas. E. Kelley, Frank H. Cozzens.

The minutes of the last meeting were read and approved.

The president then reported verbally with reference to the best manner of making the works available. "That from inquiry made and after due consideration he concludes that the works cannot be rented to advantage, cannot have sufficient business to secure a regular royalty with profit, and that the only safe method will be that the works shall be run for the benefit of whom it may concern, requiring for that purpose a cash fund of at least seventy-five thousand dollars."

It was resolved that the treasurer be and hereby is authorized to pay all demands against the company for labor, taxes, and feed for horses, upon bills approved by the president.

The president reported that he had rented the office at No. 134 Pearl street, from February 12th to May 1st, '68, for the sum of one hundred dollars, which was approved and ordered paid, and the president was, on motion, authorized to provide an office for the use of the company after May 1st, 1868.

The meeting then adjourned.

JORDAN M. FOWLER, *Sec'y.*

NEW YORK, *June 11th*, 1868.

At a meeting of the stockholders of the New York Kerosene Oil Company, held at the city of New York this day, pursuant to a call duly made under the authority of the trustees, for the purpose of taking the sense of the company upon the question of applying to the proper court for an adjudication of bankruptcy against the company, were present as follows, viz:

Wm. H. Appleton, executor, &c., of Abm. M. Cozzens, deceased, representing shares	3,590
Francis H. Cozzens, "	51
Jas. E. Kelley, executor, &c., of Eli Kelley, deceased, (by proxy)	65
John Perkins	1
Jas. E. Kelley, in his own right, (by proxy)	1

The said Wm. H. Appleton, executor, admits due notice of this meeting on behalf of 1,286 other shares, standing in the name of A. S.
325 Hewitt, Peter Cooper, Edward Cooper, and Jas. H. Austen respectively, but really belonging to the estate of said Abraham M. Cozzens, deceased, and pledged by said Cozzens to various parties as security for loans.

Mr. F. H. Cozzens was appointed chairman of the meeting.

On motion, it was unanimously

Resolved, That the treasurer of the company be, and he is hereby, authorized and directed, without unnecessary delay, to cause to be prepared and to present a petition to the proper court praying that the company may be adjudged bankrupt, pursuant to the act of Congress in that behalf made, and in other respects conforming to the said act.

Also resolved, That if for any reason it shall be more convenient, either of the other officers of the company is authorized and directed to execute and present the said petition.

The meeting then adjourned.

JORDAN M. FOWLER,
Secretary.

326 United States district court, eastern district of New York. In equity.

CHARLES JONES, AS ASSIGNEE OF THE NEW York Kerosene Oil Company,
against
THE NEW YORK GUARANTY AND INDEMNITY Company.

DECEMBER 12TH, 1874.

BENEDICT, J.:

The controversy which has given rise to this action is one between

the unsecured creditors of a bankrupt corporation styled The New York Kerosene Oil Company, and the New York Guaranty and Indemnity Company, claiming to be a secured creditor of the Kerosene Oil Company by virtue of a mortgage upon the lands of that corporation, situated within this district.

This controversy has taken the form of a suit in equity, brought by the assignee in bankruptcy of the Kerosene Oil Company, to set aside the mortgage which the Guaranty and Indemnity Company hold as security for the sum of one hundred thousand dollars ($100,000), which they claimed to have loaned to the Kerosene Oil Company.

The grounds upon which the assignee contends that this mortgage should be set aside are: First. That it is in violation of law, and therefore invalid, because it was not given to secure a debt of the corporation, but to secure the debt of a third party. Second. That it secures no debt at all, but only further advances, which is not permitted by the statute. Third. That it was never authorized by a proper resolution of the board of trustees, as required by the statute.

327 I find it necessary to consider the first of these objections only.

This objection is based upon the "general manufacturing corporation act" of the State of New York, under which the New York Kerosene Oil Company was organized. That statute, as it was originally enacted, prohibited these corporations from mortgaging or creating any lien upon their real estate (statute of 1848, chap. 40, § 2). But by the statute of 1864, chap. 517, § 2, these corporations were authorized to "secure the payment of any debt heretofore contracted, or which may be contracted by and in the business for which it was incorporated," by mortgaging its real estate, with the consent of two-thirds of the stockholders, filed as required by the act.

In view of this statute it is said that the mortgage in question is invalid, because it was given to secure, not the debt of the Kerosene Oil Company, but the debt of Abraham M. Cozzens.

The following are the facts pertinent to this enquiry: Abraham M. Cozzens was the head of the firm of Cozzens & Co., of the city of New York, and was also the president of the Kerosene Oil Company. Prior to the execution of the mortgage in question, Cozzens had effected an arrangement with the Guaranty and Indemnity Company for a loan of not to exceed $100,000, and had received in pursuance thereof the sum of $50,000.

On the 11th day of May, 1867, he delivered to the Guaranty and Indemnity Company his personal bond in the sum of $100,000, which sets forth that it is given to "secure advances of money now or hereafter to be made by the Guaranty and Indemnity Company to Abraham M. Cozzens for the sum of one hundred thousand dollars ($100,000), or any less amount, upon the condition that whenever any sum shall be advanced on this bond by the New York Guaranty and Indemnity

328 Company to the said Abraham M. Cozzens, the amount of such advances, and the date of the same, shall be endorsed on this instrument, and signed by Abraham M. Cozzens; and when the same or any part thereof shall be paid, such payment shall be endorsed on the said statement of advances; and the amount which shall at any time appear by the said endorsements of advance and payment to be then due, shall be taken and considered as the true amount due on said bond, and for which the premises which have been this day conveyed to the New York Guaranty and Indemnity Company by the New York Kerosene Oil Company, by indenture of mortgage, bearing even date herewith, shall be held liable, and for no greater sum."

The mortgage thus referred to in this bond, being the mortgage here in dispute, recites the delivery by Cozzens of his bond given to secure advances not to exceed in all $100,000, to be made to him by the Guaranty and Indemnity Company, and it conveys to the Guaranty and Indemnity Company the real estate of the Kerosene Oil Company, upon the condition that if that corporation should pay the sum mentioned in the bond, at the time and in the manner therein provided, the conveyance shall be of no effect. This mortgage and bond was duly delivered on the 11th day of May, 1867. "A full settlement of the old account" was then made. The amount then due to the Guaranty and Indemnity Company on the prior loan, including interest and commissions, was ascertained; the interest and commissions to that date, amounting to $1,943\frac{6}{100}$, paid by Cozzens, and the following entry then made upon the bond:

NEW YORK, *May 11th*, 1867.

The New York Guaranty and Indemnity Company have this day advanced me $50,000\frac{00}{100}$ on a note of the Kerosene Oil Company, which amount is secured by this bond.

A. M. COZZENS.

329 The note referred to in the above entry was a note of the Kerosene Oil Company, for the sum of $50,000, May 11th, 1867, to the order of Cozzens & Co., and endorsed by them, payable 60 days after date. This note was pledged to the Guaranty and Indemnity Company by a written instrument, signed by Cozzens, wherein it was recited that the note belonged to him, and that he delivered it to the custody of the New York Guaranty and Indemnity Company, "that company having advanced to me $50,000." By this instrument Cozzens agreed to refund the said advance, with interest at the rate of 7 per cent., within sixty days, and to pay besides to the New York Guaranty and Indemnity Company a commission for the management and charge of said note while in its custody, together with all disbursements. Power was also given by this agreement to sell the note in case of default in the repayment of the advance when due.

This part of the transaction will be better understood if it be stated here that the New York Guaranty and Indemnity Company had, by its act of incorporation, the power to receive for storage, deposit, or otherwise, promissory notes and other property, and to take the management, custody, and charge of real and personal estate or property, and to advance monies, securities, and credits upon any property, real or personal, upon such terms as might be established by the directors of said company.

On the 18th of May, 1867, Cozzens received from the Guaranty and Indemnity Company $25,000 more, and the following entry was then made upon the bond:

NEW YORK, *May 18th*, 1867.

The New York Guaranty and Indemnity Company have this day advanced me $25,000 on the note of the New York Kerosene Oil Company, which amount is secured by this bond.

A. M. COZZENS.

330 The note referred to in this entry was pledged by a written agreement signed by Cozzens, and similar to that previously given with the $50,000 note.

On June 22d, 1867, Cozzens received from the Guaranty and Indemnity Company $25,000 more, when the following entry was made upon the bond:

NEW YORK, *June 22d*, 1867.

The New York Guaranty and Indemnity Company have this day advanced me $25,000 on oil, which amount is secured by this bond.

A. M. COZZENS.

Upon this occasion no note was pledged, but instead Cozzens gave a warehouse certificate for one thousand barrels of crude petroleum oil on storage with the Kerosene Oil Company, to the order of the New York Guaranty and Indemnity Company.

These several notes, as they became due, were replaced by others similar in form and accompanied with similar agreements, until March, 1868, when the firm of Cozzens & Co. and Abraham M. Cozzens, and the Kerosene Oil Company, became insolvent, leaving the whole of the $100,000 unpaid.

This statement of fact discloses a mortgage upon real estate given by a corporation organized under the general manufacturing corporation act of the State of New York, which, upon its face, is in violation of the statute under which the corporation was formed, because it purports to secure not a debt of the corporation, but the debt of a third party. It has been contended, however, in behalf of the defendants, that the evidence offered by them respecting the original arrangement made between Cozzens and the defendants prior to the giving of the mortgage, and when $50,000 was first advanced, shows the relation of borrower and lender to have been then established between the Kerosene Oil Company and the defendants, and proves an intention to continue that relation in the subsequent transactions. Wherefore it is urged that a court of
331 equity should look through the form given to the transaction in question and construe this mortgage so as to give it the effect of a mortgage to secure a debt of the Kerosene Oil Company.

To this the reply must be that, by the evidence, no case is made out of failure through mistake to embody the intention of the parties in the written contract, which a court of equity can rectify. The parties to these contracts executed previously the contracts which they intended to execute, and those contracts accurately set forth the relation in which the parties intended to stand towards each other.

The rule applicable in all cases of contracts reduced to writing, that the written instrument is the best evidence of the agreement, therefore applies here, and it is not competent for the defendant to vary or contradict the language of this mortgage by proof of prior conversation, or by parole evidence in regard to intention.

Evidence tending to show the intention to have this mortgage secure the debt of another party, instead of the particular obligation which alone it purports to secure, certainly is evidence to vary the written instrument. But if all the evidence offered extrinsic to the mortgage be considered, it does not avail the defendants. Although the evidence shows an original application by Cozzens for a loan to the New York Kerosene Company, the loan never assumed the form originally proposed by Cozzens. For a pecuniary reason, the proposition for such a loan was not adopted. The note of the Kerosene Oil Company which Cozzens asked to have discounted, was not discounted, but taken from Cozzens as a pledge to secure an advance made to him.

So, when the mortgage came to be delivered it was accompanied with

the bond of Cozzens, and it was drawn to secure that bond, and nothing else.

The endorsements thereafter made upon the bond, as well as the subsequent pledges taken, tend still further to confirm the language of the mortgage, and shows that the defendants did not intend to lend
332 their money to the Kerosene Oil Company at 7 per cent. interest, but to lend to Cozzens, and earn a commission in addition to interest by taking from him, as a pledge to secure his debt, the note of the Kerosene Oil Company, for the care and custody of which it was agreed they should charge him a commission. It is true that Cozzens, besides being president of the Kerosene Oil Company, was the owner of nearly all the stock of the corporation, and the main occupation of the firm of Cozzens & Co. was to act as general agents and bankers of the Kerosene Oil Company, for which services they charged a commission of 7 per cent.

It is also true that at the time of the transaction in question, the Kerosene Oil Company was indebted to Cozzens & Co. in a sum nearly equal to $100,000; and it is quite manifest that the affairs of the Kerosene Oil Company and Cozzens & Co., and of A. M. Cozzens, were so closely connected that the misfortune of one was the misfortune of all. Nevertheless, the corporation, the firm and A. M. Cozzens were in fact, as in law, three distinct persons, and the defendants deliberately, and for a purpose, treated and dealt with them as distinct persons, having separate interests, and incurring separate obligations. They took from Cozzens his personal bond; they took also the mortgage of the Kerosene Oil Company to secure that bond, and they took as a pledge a note of the Kerosene Oil Company, given to Cozzens & Co., as evidence of the debt due Cozzens & Co. from the Kerosene Oil Company.

The proposition urged in behalf of the defendants that in equity they should be permitted to enforce this mortgage as an incident to the debt of the Kerosene Oil Company, because money was borrowed by Cozzens in behalf of the Kerosene Oil Company, therefore lacks the support of fact.

It does not appear that the loan was made in behalf of the Kerosene Oil Company. Upon the evidence these defendants have no
333 cause of action against the Kerosene Oil Company for money loaned, although they may have the right to sell the note of the Kerosene Oil Company, which they received from Cozzens by way of pledge. Moreover, the money which the defendants lent they gave to Cozzens, and he passed it into the bank account of Cozzens & Co., where it was used in the business of that firm, and was never credited to the Kerosene Oil Company by Cozzens & Co. The only benefit which the Kerosene Oil Company ever derived from the loan made by the defendants, was the incidental one that it enabled Cozzens & Co. to meet their current liabilities, and to continue their advances to the Kerosene Oil Company; but this incidental advantage did not create the relations of borrower or lender in law or in equity.

It seems therefore plain that a court of equity cannot be asked to disregard the form which the parties adopted to carry out their intention in respect to the transaction under consideration.

The consideration of the charge upon the lands of the Kerosene Oil Company which is sought to be established by supposing an intent not expressed by any act of the parties, never inured to the benefit of the corporation. The debt of the Kerosene Oil Company was never discharged. On the contrary the understanding was expressed that such

debt was to be kept alive, and that the defendants should charge Cozzens a commission for the safe keeping of the evidence of that debt.

In the view I have taken of this case, most of the adjudged cases to which I have been referred are not in point. In re Strand Music Hall Company (3 De Gex, J. and S. p.), the decision was based upon the ground of a defective execution through mistake, and the case is authority adverse, rather than favorable, to the defendants, for it refers with approval to the language of Lord Redesdale (Mitford Ch. Pleadings, p. 116), where it is said that in case of such a mistake, re-
334 lief could not be afforded where the consideration was inadequate; and further, that relief has been refused where the legislature has declared that an instrument wanting in a particular should be null and void; and it was manifestly the design of the legislature that those words should operate to their fullest extent.

In the present case there was no such mistake and the consideration inured to the corporation whose lands are sought to be charged.

The case of Munro vs. Port Henry Iron Company (12 Barb., 27), is inapplicable, for in this case there is no room to contend that Cozzens gave, or intended to give, the bond of the corporation instead of his own bond; neither is there any evidence here of a parole agreement by which the bond and agreement of Cozzens was to be held as collateral to any obligation of the Kerosene Oil Company. In fact no such obligation of the Kerosene Oil Company existed.

For these reasons, therefore, I am compelled to decide that the mortgage in question is void, and cannot be enforced by the defendants against the lands of the Kerosene Oil Company, which by the assignment in bankruptcy have passed to the plaintiff.

Let a decree be entered accordingly.

United States district court, eastern district of New York.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY,
plaintiff,
against
THE NEW YORK GUARANTY AND INDEMNITY
Company, defendant.

335 We consent that Butler, Stillman & Hubbard be substituted in our place as attorneys for the defendants in the above-entitled action, and that an order to that effect be entered.

Dated New York, December 31st, 1873.

BARNEY, BUTLER & PARSONS,
Defendants' Attorneys.

On reading and filing the foregoing consent.

Ordered, That Butler, Stillman & Hubbard be and they are hereby substituted in place of Barney, Butler & Parsons, as attorneys for the defendants in the above-entitled action.

Dated New York, January 2d, 1874.

Take notice that within is a copy of an order duly entered herein.

Dated New York, January 18, 1875.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Defendants' Attorneys.

To E. A. CARLEY, Esq.,
Plaintiffs' Attorney.

(Endorsed:) Dist. court of the U. S., east'n dist. of N. Y. Charles Jones, assignee in b'k't'y, pl'ff, against The New York Guaranty and Indemnity Co., def't. Consent and order of substitution. Butler, Stillman & Hubbard, def'ts' att'ys, 111 Broadway, (Trinity Building,) N. Y. City.

Due service a copy within order and notice is hereby admitted. Dated N. Y., Jan. 18, 1875.

E. A. CARLEY,
Pl'ff's Att'y.

Filed Jan. 2, 1874.

336 At a stated term of the district court of the United States for the eastern district of New York, held at the United States court rooms, in the city of Brooklyn, in said district, on the 26th day of January, 1875.

Present, the honorable CHARLES L. BENEDICT, judge of said court.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY, complainant,
vs.
THE NEW YORK GUARANTY AND INDEMNITY Company, respondent. } In equity.

This cause having come on to be heard by the court, and the testimony herein offered by the parties respectively having been taken in open court, by consent of the parties, and Mr. B. F. Tracy and Mr. William G. Choate having been heard for the complainant, and Mr. William Allen Butler for the respondent, now the pleadings, proofs and arguments having been fully considered by the court,

It is adjudged and decreed, that on the 30th day of May, in the year 1860, and thereafter continuously till the time of filing the bill of complaint in this suit, there has existed a corporation, organized and established under the laws of the State of New York, under the corporate name of "The New York Kerosene Oil Company;" that said corporation was authorized by the laws under which it was organized to take and hold such real estate within the State of New York as might be required for the purpose of carrying on the business for which it was organized; that in pursuance of said authority the said corpora-
337 tion on or about the 28th day of July, 1860, purchased and became the holder and owner in fee of all that real estate situated in the county of Queens and State of New York, set forth and described in the said bill of complaint in this suit, and continued to hold and own the same until the same was conveyed to the complainant herein as hereinafter stated; that on the 15th day of June, 1868, the said corporation presented its petition to the judge of the district court of the United States for the eastern district of New York, under the act of Congress establishing a uniform system of bankruptcy, passed on the second day of March, 1867, to be declared a bankrupt, and such proceedings were thereupon had that on the 16th day of said June said corporation was declared and adjudged a bankrupt by a decree of said district court, and that thereafter on the 8th day of September, 1868, the complainant in this suit was duly appointed the assignee in bankruptcy of said corporation, whereupon said complainant accepted said trust and duly qualified therefor, according to the requirements of said act of Congress,

and that on the eighth day of said September, by a deed of assignment and conveyance executed in the form and manner provided by said act of Congress, all the property, real and personal, of the said corporation, including the real estate aforesaid, became and was conveyed to and vested in the complainant in this suit as such assignee in bankruptcy, and that thereupon said complainant entered upon and took possession of the said real estate as the assignee in bankruptcy of the said corporation.

And it is further adjudged and decreed, that a certain corporation, located and having its place of business in the county of New York, in the southern district of New York, entitled "The New York Guaranty and Indemnity Company," created and existing by virtue of a law of the State of New York, passed on the 13th day of April, in the
338 year 1864, entitled "An act to incorporate the New York Guaranty and Indemnity Company," said corporation being the respondent in this suit, did, at and before the commencement of this suit, claim some interest in or lien upon the said real estate, by virtue of a certain alleged mortgage thereof, purporting to have been executed on the 29th day of April, 1867, on behalf of said bankrupt corporation and under its corporate seal, by Abraham M. Cozzens, then its president, George W. Austen, then its secretary, a copy whereof and of the certificates of the acknowledgment and registration thereof is annexed to said complainant's said bill of complaint marked A; that the claim of interest thus made by the New York Guaranty and Indemnity Company, the respondents herein, in and upon said real estate, is adverse to the claim and interest of and in the same of said complainant as such assignee in bankruptcy as aforesaid; that said respondent on or about the 10th day of October, 1868, commenced an action against said complainant in the supreme court of the State of New York by service upon said complainant of summons and complaint, wherein it is alleged, among other things, that said mortgage is a valid and subsisting mortgage and lien upon said real estate as security for a loan of one hundred thousand dollars made by said The New York Guaranty and Indemnity Company, said respondent, to said bankrupt corporation, and wherein the said The New York Guaranty and Indemnity Company, the said respondent, demands against the said complainant in this suit, and the other parties named as defendants in said action, among other relief, that the said mortgage be established and adjudged a valid and prior lien upon said real estate, and that the said bankrupt corporation be adjudged to be indebted to said The New York Guaranty and Indemnity Company, the respondent herein, in said sum of one hundred
339 thousand dollars and interest, and that the complainant herein, and said other defendants, be barred and foreclosed of all their right, claim, lien, and equity of redemption therein, and that said premises be sold under the order of said supreme court, for the purpose of foreclosing said mortgage and paying said alleged debt; that the complainant herein has not appeared in said action nor submitted himself or the subject matter thereof to the jurisdiction of said supreme court.

And it is further decreed and adjudged that the said bankrupt corporation was, by the laws of the State of New York, under which it was organized, prohibited from making any mortgage of its real estate, except that it was by and under said laws authorized to mortgage its real estate to secure the payment of debts contracted by it in the business for which it was incorporated, the written assent thereto of the stockholders, owning at least two-thirds of its capital stock, having been

first filed in the office of the clerk of the county where such real estate is situated; that said mortgage was not executed for the purpose authorized by said laws; that the same was not made to secure the payment of any debt contracted by said bankrupt corporation in the business for which it was incorporated or to secure any debt of said bankrupt corporation; that said mortgage was in fact made and given to the said respondent to secure a certain bond of the said Abraham M. Cozzens, referred to in said mortgage, and a copy whereof is annexed to the complainant's said bill of complaint marked B, and for money advanced and to be advanced by said respondent to said Abraham M. Cozzens individually, as expressed in the said bond and mortgage, and that said respondent has never loaned or advanced to the said bankrupt corporation any money upon the security of said mortgage, and that no money advanced by the said respondent to said Cozzens upon the security thereof has ever come to the hands and possession of said bank-
340 rupt corporation or of the complainant herein as its assignee as aforesaid.

And it is further adjudged and decreed that said mortgage is wholly null and void, and that the same be, and it is hereby, cancelled, set aside and held to be of no effect, and that the said respondent has not by reason thereof any claim, lien or interest whatsoever in, to, or upon the said real estate or any part thereof, and that the said respondent, its officers, agents and attorneys be forever enjoined from taking any measures whatever, at law or otherwise, by further proceedings in said action in the supreme court hereinbefore referred, or by any other act or proceeding whatsoever to foreclose or enforce the said mortgage or any claim, lien or interest in or upon said real estate under or by reason thereof, and from transferring or assigning the said alleged mortgage to any person or persons whomsoever.

And it is further ordered, adjudged and decreed that the complainant recover against the respondent his costs and disbursements in this suit, to be taxed according to the course and practice of this court, and that the complainant have execution therefor.

(Endorsed:) U. S. district court, eastern district of N. Y. Charles Jones, assignee, vs. The New York Guaranty and Indemnity Company. Decree. Filed Jan. 26, 1875.

341 U. S. district court, eastern district of New York. In equity.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY OF The New York Kerosene Oil Company, plaintiff and respondent,

vs.

THE NEW YORK GUARANTY AND IDEMNITY COMpany, defendant and appellant.

Please take notice that the above-named defendant, The New York Guaranty and Indemnity Company, claims an appeal, and hereby appeals to the circuit court of the United States of America, for the eastern district of New York, in the second circuit, from the decree, decision, order and judgment of the district court of the United States of America, for the eastern district of New York, entered herein on the 26th day of January, 1875, in favor of the plaintiff, Charles Jones, assignee, &c., and against the said defendant, The New York Guaranty

and Indemnity Company, and from each and every part of said decree decision, order and judgment.

Dated New York, Jan. 26, 1875.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Defendants' Attorneys.

To E. A. CARLEY, Esq.,
Plaintiff's Attorney.
CHARLES JONES, Esq.,
Assignee, &c.
B. LINCOLN BENEDICT, Esq.,
Clerk United States District Court,
Eastern District of New York.

342 (Endorsed:)

Please take notice that the within is a copy of a notice of appeal, this day filed herein.

Dated New York, Jan. 27, 1875.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Att'ys for Def't and App'lt.

To E. A. CARLEY, Esq.,
Att'y for Pl'ff and Resp't.
CHARLES JONES, Esq.,
Assignee, &c.

(Endorsed:) U. S. district court, eastern district of New York. Charles Jones, assignee in bankruptcy, &c., vs. The New York Guaranty and Indemnity Company. Notice of appeal. Butler, Stillman & Hubbard, def'ts' att'ys. Due service of a copy of within and notice of filing the same is hereby admitted. Dated N. Y., Jan. 28, 1875. Charles Jones, assignee. E. A. Carley, att'y for pl'ff and resp't. Filed January 27th, 1875.

United States circuit court, eastern district of New York.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY OF The New York Kerosene Oil Company, complainant and respondent,
vs.
THE NEW YORK GUARANTY AND INDEMNITY COMPANY, defendant and appellant.

To the honorable the circuit court of the United States of America for the eastern district of New York, in the second circuit.

343 The appeal of the above-named appellant, The New York Guaranty and Indemnity Company, respectfully showeth that on or about the 28th day of September, in the year one thousand eight hundred and sixty-nine, the above-named complainant, Charles Jones, assignee in bankruptcy of the New York Kerosene Oil Company, filed his certain bill in equity in the district court of the United States of America, for the eastern district of New York, praying that a certain mortgage, mentioned and described in said bill be declared void; and for an injunction to restrain the said defendant from foreclosing the said mortgage, and for other relief for the reasons set forth in said bill.

That process and a subpœna having issued thereon out of said court and having been duly served, the said defendant did on or about the fourth day of February, in the year one thousand eight hundred and seventy, file its answer to the said bill in the said district court, praying, among other things, that the said bill be dismissed with its costs in that behalf, as by reference to said bill and said answer may more fully appear.

That the said case came on to be heard before honorable Charles L. Benedict, judge of said district court, on or about the thirteenth day of October, in the year one thousand eight hundred and seventy-four, and the day next immediately succeeding thereto, upon the pleadings in said case, and the testimony and proofs adduced by the respective parties; and the cause having been thereafter submitted to said judge, and the said judge having advised thereon, did, on the 26th day of January, in the year one thousand eight hundred and seventy-five, make a decree or decision in said cause, whereby it was among other things decreed and adjudged that said mortgage mentioned and described in said bill be held and declared void, as by reference to said decree or decision will more fully appear.

And this appellant is advised and insists that the said decree,
344 decision, and judgment is erroneous, inasmuch as said mortgage should not be declared and held void in the premises.

And this appellant for this and other reasons appeals from the whole of the said decree so made in favor of said complainant Charles Jones, assignee in bankruptcy, and against this appellant, defendant, to the next circuit court of the United States of America to be held in said district.

And this appellant therefore prays that the said decree and judgment, and every part thereof, may be reversed with costs, or such other decree and judgment there made as to the said circuit court shall seem just, and that the said respondent may be condemned to pay to this appellant its costs and damages in the premises.

And this appellant prays that the record and proceedings herein may be returned to the said circuit court, and that the said decree may be reversed, or such other decree thereon be made as to the said circuit court shall seem just, and that the appellee or respondent may be condemned to pay to this appellant its costs and damages in the premises.

BUTLER, STILLMAN & HUBBARD,
Solicitors and Attorneys for Appellant.
WILLIAM ALLEN BUTLER, *Counsel.*

Dated New York, Jan. 26th, 1875.

(Indorsed:)
Please take notice that the within is a copy of a petition of appeal this day duly filed herein.
Dated N. Y., Jan. 27, 1875.
Yours, &c.,
BUTLER, STILLMAN & HUBBARD,
Att'ys for Def't and App'l't.

To E. A. CARLEY, Esq.,
Att'y for Pl'ff and Resp't.
CHARLES JONES, Esq.,
Assignee, &c.

345 (Endorsed:) N. Y. U. S. circuit court, eastern district of New York. Charles Jones, assignee in bankruptcy of the New York

Kerosene Oil Company, complainant and respondent, vs. The New York Guaranty and Indemnity Company, defendant and appellant. Petition of appeal. Butler, Stillman & Hubbard, def'ts' att'ys, 111 Broadway, N. Y.

Due service of a copy of within petition of appeal and notice of filing same is hereby admitted.

Dated N. Y., Jan. 28th, 1875.

CHARLES JONES,
Assignee, &c.

E. A. CARLEY, Esq.,
Att'y for Pl'ff and Resp't.

Bond for costs and damages.

District court of the United States of America for the eastern district of New York.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY of the New York Kerosene Oil Company, plaintiff and respondent,
vs.
THE NEW YORK GUARANTY AND INDEMNITY Company, defendant and appellant.

Know all men by these presents that we, James P. Wallace, of the city of Brooklyn, county of Kings, and State of New York, and Samuel D. Babcock, of the city, county, and State of New York, are held and firmly bound unto the above named plaintiff, Charles Jones, assignee, &c., in the sum of two thousand dollars, to be paid to the said plaintiff, Charles Jones, assignee, &c., for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

346 Sealed with our seals, and dated the 26th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas, on the 26th day of January, one thousand eight hundred and seventy-five, a final decree was rendered by the district court of the United States of America for the eastern district of New York, in the above-entitled action, being a case in equity brought by Charles Jones, assignee in bankruptcy of the New York Kerosene Oil Company, plaintiff, against the New York Guaranty and Indemnity Company, defendant, in said district court of the United States of America, for the eastern district of New York, to set aside and have declared void a certain mortgage mentioned and described in the bill of complaint in this case, and in the decree therein; and wherein and whereby said decree it was adjudged and decreed in favor of said plaintiff and against said defendant, that said mortgage be declared held void and of no effect.

And whereas said final decree was duly filed in the office of the clerk of said United States district court for the eastern district of New York, on the 26th day of January, 1875.

And whereas the said defendant, The New York Guaranty and Indemnity Company, feeling aggrieved thereby, has appealed from the said final decree to the circuit court of the United States of America, in the eastern district of New York, in the second circuit.

Now, therefore, the condition of this obligation is such that if the above-named appellant, The New York Guaranty and Indemnity Company,

shall prosecute their said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES P. WALLACE. [s.]
S. D. BABCOCK. [s.]

347 Sealed and delivered, and taken and acknowledged this 26th day of January, 1875.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York:

James P. Wallace and Samuel D. Babcock, within named, being severally duly sworn, do each depose and say: James P. Wallace, that he resides at 14 Schermerhorn street, Brooklyn, and Samuel D. Babcock, that he resides at No. 528 Fifth avenue, New York; and each that he is a freeholder within this State, and is worth the sum of two thousand dollars over and above all his just debts and liabilities.

JAMES P. WALLACE.
S. D. BABCOCK.

Sworn to this 26th day of January, A. D. 1875.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

We approve of the foregoing bond as to form and sufficiency.

CHARLES JONES,
Assignee, &c.
E. A. CARLEY,
Pl'ff's Att'y.

Dated New York, Jan. 26, 1875. C. L. B.

(Endorsed:)

Please take notice that the within is a copy of a bond on appeal, this day duly filed herein.

Dated New York, Jan. 27th, 1875.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Att'ys for Def't and App'l't

To E. A. CARLEY, Esq.,
Att'y for Pl'ff and Resp't.
CHARLES JONES, Esq.,
Assignee, &c.

348 (Endorsed:) U. S. district court, eastern district of New York Charles Jones, assignee, &c., vs. The New York Guaranty and Indemnity Company. Copy. Bond for costs and damages on appeal. Due service of a copy of the within bond and notice of filing is hereby admitted. Dated N. Y., Jan. 28th, 1875. Charles Jones, assignee, &c. E. A. Carley, att'y for pl'ff and resp't. Filed January 27th, 1875.

We consent that case as printed within be certified by the clerk as the record herein for the circuit court.

Dated New York, June 1, 1875.

E. A. CARLEY, *Solicitor for Compl't.*
BUTLER, STILLMAN & HUBBARD,
Respondent's Solicitors.

349 United States circuit court, eastern district of New York. In the second circuit.

Before Hon. Ward Hunt, associate justice.

CHARLES JONES, AS ASSIGNEE OF THE NEW York Kerosene Oil Company, complain't and respondent,
vs.
THE NEW YORK GUARANTY AND INDEMNITY Company, defendant and appellant.

MAY 22ND, 1877.

Cause called, hearing ordered.
Wm. Allen Butler, esq., appears for appellant.
Wm. G. Choate, " " " appellee.
Mr. Butler opens for appellant.
Hearing suspended to May 23rd, 1877, at 11 a. m.

350 MAY 23RD, 1877.

Hearing resumed.
Mr. Butler closes his argument.
Judge Geo. F. Comstock argues for appellant.
Mr. William G. Choate replies on behalf of appellee.
Cause submitted.
Decision reserved.

351 *Statement of case.*

U. S. circuit court, eastern district of New York. In bankruptcy.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY of The New York Kerosene Oil Company, complainant and respondent,
vs.
THE NEW YORK GUARANTY AND INDEMNITY Company, defendant and appellant.

This is a suit in equity brought by the complainant as assignee in bankruptcy of the New York Kerosene Oil Co., a manufacturing corporation organized under the general laws of New York, for the formation of manufacturing corporations, to avoid and set aside an instrument purporting to be a mortgage by the said bankrupt corporation upon its real estate, to the defendant, for one hundred thousand dollars, dated April 29, 1867.

The grounds of the illegality of the mortgage alleged in the bill, are that it is a mortgage prohibited by the laws of the State of New York; that it was not given to secure the payment of debts contracted by it in the business for which said company was incorporated; that it was not made in the form and manner required by the laws; that it was not made with the consent of said bankrupt corporation; that it was
352 given to secure the bond of Abraham M. Cozzens, and that no money had been loaned or advanced on it to said bankrupt corporation.

All these averments of the bill are denied by the answer, which alleges that the mortgage was given to secure the debt of the bankrupt

corporation, contracted in the business for which it was incorporated, and not for the debt of Cozzens, and that the mortgage was in all respects made and executed conformably to the laws of New York.

The mortgage is as follows:

"This indenture, made, &c., between The New York Kerosene Oil Company, &c., of the first part, and the New York Guaranty and Indemnity Company, &c., of the second part.

"Whereas, at a regular meeting of the board of trustees of the said The New York Kerosene Oil Company, held on the ninth day of March, 1867, it was resolved that Abraham M. Cozzens, the president of said company, be authorized to borrow a sum not to exceed one hundred thousand dollars, and to secure the same to execute a mortgage upon the factory and premises of the said company at Newtown, Queens County, Long Island.

"And whereas the said Abraham M. Cozzens, has made and delivered to said parties of the second part, his certain bond or obligetion bearing even date with these presents in the penal sum of one hundred thousand dollars, lawful money of the U. S. of America, which said bond declares that the same is given to secure advances to be made by the said party of the second part, to the said Abraham M. Cozzens, in all not to exceed the sum of one hundred thousand dollars, upon certain conditions therein contained, as by reference to said bond will more fully appear, and the consent of the stockholders of said party of the first part, having been first duly given and filed pursuant to law and recorded herewith. Now, this indenture witnesseth that the said parties of the first part, for the better securing the payment of the said sum of
353 money mentioned in the condition of the said bond, or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, &c., unto the said party of the second part, and to their successors and assigns for ever." (Here follows description of property and usual habendum in fee.) "Provided always and these presents are upon the express condition, that if the said parties of the first part, their successors or assigns, shall well and truly pay unto the said parties of the second part, their successors or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time, and in the manner mentioned in said condition, according to the true intent and meaning thereof, that then these presents and the estate hereby granted shall cease, determine and be void. And the said Abraham M. Cozzens, for himself, his heirs, executors and administrators doth covenant and agree to pay unto the said party of the second part, their successors or assigns, the said sum of money, and interest, as mentioned above, and expressed in the condition of the said bond." (Then follows the usual clause for entry and sale in case of default.)

The bond of A. M. Cozzens, bearing the same date as the mortgage, is as follows:

"Know all men by these presents that I, Abraham M. Cozzens, of the city of New York, am held and firmly bound unto the New York Guaranty and Indemnity Company in the sum of one hundred thousand dollars lawful money of the United States of America, to be paid to the said New York Guaranty and Indemnity Co., their successors and assigns, for which payment well and truly to be made I bind myself, my

heirs, executors, and administrators, firmly by these presents, sealed with my seal, dated, &c.

354 "This bond is to cover advances of money now or hereafter to be made by the said New York Guaranty and Indemnity Co. to the said Abraham M. Cozzens for the sum of one hundred thousand dollars, or any less amount, upon the condition that whenever any sum shall be advanced on this bond by the said The New York Guaranty and Indemnity Co. to the said Abraham M. Cozzens the amount of such advance and the date of the same shall be endorsed on this instrument and signed by the said Abraham M. Cozzens; and when the same or any part thereof shall be paid, such payment shall be endorsed on or under such statement of advance; and the amount which shall at any time appear by said endorsements of advance and payment to be then due shall be taken and considered as the true amount due on said bond and for which the premises which have this day been conveyed to the said The N. Y. Guaranty and Indemnity Company by the New York Kerosene Oil Company, by indenture of mortgage bearing even date herewith, shall be held liable, and for no greater sum.

(Signed) "A. M. COZZENS." [L. S.]

The following endorsements appeared on the bond:

"NEW YORK, *May 11th*, 1867.

"The New York Guaranty and Indemnity Company have this day advanced me fifty thousand dollars on the note of the New York Kerosene Oil Company, which amount is secured by this bond.

"A. M. COZZENS."

"NEW YORK, *May 18th*, 1867.

"The New York Guaranty and Indemnity Company have this day advanced me twenty-five thousand dollars on the note of the New York Kerosene Oil Company, which amount is secured by this bond.

"A. M. COZZEN."

355 "NEW YORK, *June 22d*, 1867.

"The New York Guaranty and Indemnity Company have this day advanced me twenty-five thousand dollars on oil, which amount is secured by this bond.

"A. M. COZZENS."

It was insisted on the part of the complainant that the mortgage was void on its face, as in violation of the statutes of New York (act 1848, ch. 40, § 2, and act of 1864, ch. 517, § 2), which are as follows:

"When the certificate shall have been filed, as aforesaid, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, &c., &c.; and they shall, by their corporate name, be capable in law of purchasing, holding, and conveying any real and personal estate whatever, which may be necessary to enable the said company to carry on their operations named in such certificate, but shall not mortgage the same, or give any lien thereon.

"Any corporation formed under the said act, passed Feb. 17th, 1848, or of the acts amending or extending the said act, may secure the payment of any debt heretofore contracted, or which may be contracted by it in the business for which it was incorporated, by mortgaging all or any part of the real estate of such corporation; and every mortgage so made shall be as valid to all intents and purposes, as if executed by an

individual owning such real estate; provided, that the written assent of the stockholders owning at least two-thirds of the capital stock of such corporation, shall first be filed in the office of the clerk of the
356 county where the mortgaged property is situated." (Act of 1864, ch. 517, § 2; 6 Edmunds, Stat., p. 300.)

It was also insisted on the part of the complainant that evidence extrinsic to the bond and mortgage was not admissable for the purpose of showing that the mortgage was intended to secure a debt of the bankrupt corporation. Without determining the question of the admissability of the evidence on the trial, all the testimony was received subject to the objection.

The principal facts extrinsic to the mortgage shown by the evidence introduced were as follows:

The N. Y. Kerosene Oil Co. was organized as a manufacturing corporation under the act of 1848, in the year 1860, with a capital stock of $500,000, of which $25,000 was paid in cash and $475,000 issued for property, including the real estate described in the mortgage.

Its business consisted of manufacturing kerosene oil and other products of petroleum, and disposing of them in the market.

At about the same time the firm of Cozzens & Co. was formed, consisting of Abraham M. Cozzens, since deceased, and his son Thomas M. Cozzens. Their business was buying and selling kerosene oil and other products of petroleum, and they became the business agents of the corporation, attending to all its business affairs, buying petroleum, selling oil, and managing generally its financial affairs. The business of the corporation constituted a large part of the business of Cozzens & Co. (Id.) Up to some time in 1864 the corporation kept a bank account. In that year it was closed, and from that time on Cozzens & Co. received all its moneys and paid all its bills and *and* accounts.
357 Its receipts were mainly from the sales of oil, and including the earnings of a steam-tug and lighters owned by it, and proceeds of sales of barrels and other things which it procured in the course of its business.

Its disbursements were mainly for crude petroleum, labor and materials and repairs.

Cozzens & Co. were allowed a guaranty and sales commission of 7½ per cent. on all sales as compensation for all their services.

The mode of keeping the accounts between the corporation and Cozzens & Co. was as follows:

Cozzens & Co. opened in their books an account with the corporation, in which they credited the corporation at the end of each month with the gross proceeds of the sales of oil during the month, and with all moneys received from other sources on account of the corporation, and charged their 7½ per cent. commission on all disbursements on account of the corporation.

Large sums were required by Cozzens & Co. to carry on the business of the corporation, and also in their other business.

Moneys received by Cozzens & Co. on account of the corporation went into Cozzens & Co.'s own bank account, being credited at the end of the month to the corporation, as above stated.

The corporation kept a separate set of books. Its accounts with Cozzens & Co. was a transcript of, or made up from, the account with the corporation in the books of Cozzens & Co.

For the better exhibition of its business several different accounts were opened, but these do not effect the relations between the corporation and Cozzens & Co.

358 Abraham M. Cozzens was the principal and managing partner of Cozzens & Co. His partner, Thos. M. Cozzens, as between themselves, seems to have been rather a nominal partner, signing the firm name, and acting as bookkeeper at times, but transacting no business, unless under the direction of his father, and taking no responsibility. A. M. Cozzens alone directed and managed the business of the firm and of the corporation.

A. M. Cozzens was the largest stockholder of the corporation, and for several years before the giving of the mortgage in question was its president. By the stock-ledger, he was at the time the mortgage was given the holder of 3,590 shares out of 5,000.

During the year 1867, Cozzens & Co. were in advance to the corporation, as appears by the accounts, as follows: Jan'y 1, '67, $158,201.80; Jan'y 31, 1867, $91,000; Feb. 14, $95,973.85.

From 28th Feb. to June 30th it at all times exceeded $100,000.

The receipts and disbursements from Jan'y to Aug., 1867, given by months.

Excess of receipts over disbursements, interest, and commissions from Jan'y 1 to Aug. 31, was $71.136.92.

This being the relation between the corporation and Cozzens & Co., A. M. Cozzens made application to the New York Guaranty and Indemnity Company for a loan.

The application was first made to Mr. Babcock, one of the directors, who referred Mr. Cozzens to Mr. Henry, the president, and Mr. Wallace, the vice-president, of the defendant corporation.

359 Mr. Babcock testifies to certain representations made by Mr. Cozzens at the time of this application, afterwards repeated by him to Mr. Henry and Mr. Wallace. Mr. Henry and Mr. Cozzens are both dead. Mr. Wallace also testifies to the representations and application of Mr. Cozzens, in substance as follows:

He stated that the Kerosene Oil Co. was indebted to Cozzens & Co. in $100,000.

That the company needed large advances to carry on the business.

That he was the owner of nearly all the stock, and virtually the owner of the concern, and had the sole management of its business.

That he had a right to promise that the corporation should give a mortgage to secure the advances.

Mr. Wallace requested him to put the substance of his statement in writing, and he did so in the form of a letter, as follows:

N. Y. GUARANTY AND INDEMNITY CO.,
Office No. 14 *Broad Street,*
February 15, 1867.

THE N. Y. GUARANTY AND I. CO.,
J. J. HENRY, Esq., *President:*

DEAR SIR: It is understood that we will cause to be prepared a mortgage on the real estate of the company on Newtown Creek, for the sum of $100,000, in your favor, and to be held by you for the loan of $50,000 made this day, and any future loan you may make to our company.

Your obedient servant,

A. M. COZZENS,
President of the N. Y. Kerosene Oil Co.

At the same interview Cozzens produced a note of the Kerosene Oil Co. payable to the order of Cozzens & Co., and endorsed by Cozzens & Co., and stated that it represented a part of the debt of the Kerosene

Oil Co. to Cozzens & Co., and asked to have it discounted, and
360 promised that the corporation should give a mortgage to secure this $50,000, and further advances to the amount in all of not more than $100,000.

After this interview, and on the same day (Feb. 15, 1867), the defendant advanced $50,000.

They took at the time of the advance a contract similar to that required by them on all loans, which was signed either by A. M. Cozzens or by Cozzens & Co., probably by Cozzens & Co.

The original contract is not found, but the renewal of it shows its form, and the register of the defendant shows the date, parties, and other particulars.

These contracts, signed by Cozzens, acknowledge the receipt of the advance of money upon the note of the N. Y. Kerosene Oil Co., and promise to repay the same with interest, and certain stipulated commissions for keeping the note, subject to conditions endorsed on the contract.

The conditions endorsed provide for a sale of the note in case of default.

The register kept by defendant shows that the contracts given in Feb'y upon the first and second advances were signed by Cozzens & Co.

It is quite evident that when the bond of A. M. Cozzens was given on the 10th of May, the contemporaneous and subsequent contracts were taken in his name to conform thereto.

On this contract being signed, and the note referred to in it being delivered with it to the defendant, the first advance was made on the 15th of February, 1867 ($750 was deducted for the commission referred to in the contract), and the company's check for $49,250 payable to
361 Cozzens & Co. was delivered to Cozzens.

Afterwards the bondand mortgage in question were prepared by Mr. Cozzens, and delivered to Mr. Wallace; they were dated March 9th, 1867. Mr. Wallace sent them to Mr. Butler, counsel of the company, to have the title examined, and the securities approved.

Mr. Butler required the formal consent of the stockholders to be prepared in conformity with the statute, and a recital of it to be inserted in the mortgage. The mortgage was then redated, reacknowledged and redelivered to the defendant on the 11th of May, 1867.

He also called for, or had furnished to him, a sworn certificate of the resolution of the directors by the sec'y.

An account was made up of the interest due on the $50,000 advance; a charge was made for commissions to the 11th of May, at the same rate of 1½ per cent. for 60 days, and these sums, together with discount and commissions for the next 60 days, amounting in all to $1,943.06, were paid by Cozzens & Co., and a new contract was signed by A. M. Cozzens to conform to the bond.

May 18th, a further advance of $25,000 was made in a check to order of A. M. Cozzens on a similar contract signed by Cozzens. A similar contract and note were given. It was endorsed on the bond.

June 22d, a further advance was made of $25,000 in check to order of A. M. Cozzens, endorsed on the bond. For this no note was given, but what purports to be a warehouse certificate for oil, signed by Cozzens, pres't.

362 The cheques for these three advances were deposited in Cozzens & Co. bank account, and from that bank account Cozzens & Co. drew indiscriminately their cheques on their own account, and to pay bills and disbursements of the Kerosene Oil Co. (Fowler, fols. 230

and 233.) In fact, as shown by the check-book, most of the money went to repay other loans due from Cozzens & Co. to other parties.

No part of this money was directly credited by Cozzens & Co. to the Kerosene Oil Company on their own books, or on the books of the Kerosene Oil Co., nor were the payments for interest or commissions paid to the def't, charged to or made matter of account with the Kerosene Oil Co. in the books of Cozzens & Co., or of the corporation.

Cozzens was shown to have signed notes, and to have accepted drafts and endorsed notes and drafts as president of the corporation, at about the time of this transaction, and money raised on this paper went into the bank account of Cozzens & Co., and was not subject of account with the Kerosene Oil Co. in its books, or in those of the Kerosene Oil Co. The particulars of the negotiation of such loans were not in evidence.

The bill of Barney, Butler & Parsons for examin'g the title, &c., was made out against the Kerosene Oil Co., and was paid May 27, 1867, and charged as a debt to the Kerosene Oil Co. in Cozzens & Co.'s books, and from them carried to the credit of Cozzens & Co., into the books of the Kerosene Oil Co.

So was the expense ($1.00) paid to the notary for taking the acknowledgment of the secretary to copy of resolution furnished to Mr. Butler.

The bill of Barney, Butler & Parsons was made out to the New York Kerosene Oil Co.

363 United States circuit court, eastern district of New York.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY of New York Kerosene Oil Company, complainant and respondent,
vs.
THE NEW YORK GUARANTY AND INDEM'ITY Company, defendant and appellant.

JUNE 11TH, '77.

HUNT, J.:

The preceding statement of facts is taken chiefly from the brief presented by the respondent's counsel. The brief of the appellant's counsel does not substantially vary them. In each brief the facts supposed by the counsel to be the most important are presented with more or less prominence, but they are substantially the same. It is a
364 great satisfaction to the judge called upon to decide the case that there is so little difference between the counsel in this respect, while the careful and lucid arguements have given great aid in reaching a conclusion upon the rules of law which should control the decision.

The learned judge of the district court held that the mortgage in question was given to secure the debt of Mr. Cozzens and not the debt of the Kerosene Corporation. That it was in violation of the statutes of New York and therefore void. It is to this point that the burden of the arguement is devoted.

The contest is between the creditors of the Kerosene Company
365 whose debts are unsecured and the Guaranty Company claiming the security of the mortgage upon the real estate of the former company. If the respondent prevails as he did in the district court, the general creditors will receive payment of a considerable portion, perhaps all of their debts. If the appellant prevails, they will receive nothing.

The charge is made at the outset that this mortgage is void on its face. It is alleged that upon its face it appears to have been made to secure the debt of Cozzens and not of the corporation. This it is said is in violation of the statutes of 1848 and 1864, of the State of New York, which are set forth in the preceeding statement.

By the statute of 1848 it is provided that a company incor-
366 porated under its authority shall not mortgage the same (its real or personal property) or give any lien thereon. By the statutes of 1864 it is enacted that such corporation "may secure the payment of any debt heretofore contracted or which may be contracted by it in the business for which it is incorporated by mortgaging all or any part of the real estate of such corporation * * * provided that the written assent of the stockholders owning at least two-thirds of the capital stock of such corporation shall be first filed in the office of the clerk of the county where the mortgage property is situated."

The objection under this head divides itself into two parts: first, that the mortgage upon its face secures the debt of Cozzens and not
367 the debt of the company, and that this is in violation of the statutes, which it is said allows a mortgage to be given only for the debt of the corporation theretofore contracted or thereafter to be contracted by it in its legitimate business.

It is said secondly that this mortgage secures no debt at all; that it only purports to secure future advances, and that such a mortgage is not within the statute. The consideration of the first of these suggestions will properly occur in examining the question of the validity of the mortgage under all the facts in the case of which these suggestions form a part. The second I do not consider as requiring much attention.

368 It is said again that the mortgage is void for want of authority to execute it. Of the first branch of this objection, that in fact a quorum of the trustees did not authorize the mortgage, I deem it enough to say that the proof which attacks the recitals of the mortgage in that particular entirely fails of its purpose.

That the resolution as passed only authorized the execution of a mortgage, and that the recited resolution in giving authority also to borrow the amount of money named went beyond the resolution, appears to be true. But no resolution was needed to authorize the agents and managers of the company to borrow money. They possessed that power by the common law and by the statute, and exercised it by
369 their own power whenever it became necessary. It was only authority from the trustees to execute a mortgage that was needed.

I think it was not essential that the details of the transaction, to whom or from whom or what was the debt referred to, should be specified in the resolutions. The authority was to execute a mortgage of a $100,000 on the property of the corporation, and if executed to secure a debt contracted by it in fact, the precaution of the statute is satisfied. The statute was intended to aid the operations of the company, and when it appears as in this case that it was in fact made for a particular purpose known to the trustees, and that such purpose was fully carried
370 out by the execution of a mortgage as intended, there is a compliance with the statute.

I agree entirely with the proposition that a mortgage executed by this corporation, unless it is given to secure its own debt, is forbidden by the statute and is void.

It is no doubt also true as a general rule that where a bond and mortgage are executed the bond is the principal and the mortgage is the security only. Thus the payment of the bond discharges the mortgage,

the transfer of the bond in whole or in part carries with it the security of the mortgage to the same extent although the mortgage be not named, while the satisfaction of the mortgage would not necessarily can-
371 cel the debt. If the mortgage in question was given simply and purely to secure the debt of Mr. Cozzens, in which the company had no interest, it cannot be sustained. It may be assumed also, I think, that the burden of proving that the debt secured by this mortgage is the debt of the company and not the debt of Cozzens rests upon the appellants. The substantial agreement upon the facts renders it however rather a question of law in present instance than a question of fact, and where the burden rests is less important than it would otherwise be.

The authorities are clear that in determining a case like the present, the court will not allow itself to be embarrassed by the form in
372 which the transaction is presented. As the court will not permit a dishonest or illegal purpose to be accomplished by presenting it in a legal form, so it will not allow an honest transaction to be overthrown because it comes in an exceptionable form. It will look through all the forms and carry out the transaction according to the real intent of the parties (Horn vs. Ketaltas, 46 N. Y. R., 605). The court places itself in the situation of the parties and looks at all the circumstances as the parties looked at them (Marks vs. Towrie, 6 Wall., 684). Thus instruments absolute on their face may be shown by extrinsic evidence to be intended as security only, and when a series of instru-
373 ments are executed the question is, upon all the circumstances, what was the intention of the parties (White Water Valley vs. Vallette, 21 How., 414–422; Chester Bank vs. Kingston, 16 N. Y., 336, 343). In the present case the fact that the bond is that of Cozzens is not conclusive that the mortgage was given solely to secure his debt. It is the duty of the court to ascertain what is the truth of the case.

A reference to some of the leading facts will illustrate my view of the transaction.

I. Cozzens owned substantially all of the stock of the Kerosene Company and transacted its entire business, and at the date of the
374 first advance by the Guaranty Company he was the creditor of the Kerosene Company in a sum exceeding $100,000. The necessity of having more funds which pressed upon him was, in fact, the necessity of the company.

II. When Cozzens made application for this loan he made it in the name of the company as its agent and for the company, and not for himself individually.

III. When he received the first installment of the loan ($50,000) February 15th, 1867, he gave as security the note of the company, accompanied by a written promise to furnish the mortgage of the company for its further security. There could be no misunderstanding at
375 that time as to the fact that the parties intended a loan to the company of $100,000 upon the security of a mortgage to be executed upon its property, and that Cozzens was acting as the agent of the company.

IV. The Guaranty Company advanced the money upon this note as requested and upon the promise of the mortgage security.

Another contract in writing was taken at this point of time, and here the divergence between the parties commenced. The respondents argue that although originally a loan to the company might have been contemplated to be secured by their mortgage, that such intention was

not carried out, but a new contract of a pledge of the note of the
376 company by Cozzens to secure a loan to him was the transaction as it was made, and that this loan by Cozzens was evidenced by his bond and his debt was secured by the mortgage of the company.

The paper thus given is not produced, but its form is clearly shown by the paper given in renewal. It was signed by Cozzens and recited that the Guaranty Company had advanced to him the sum of $50,000 upon the note of the Kerosene Company, which note belonged to him, and that he agreed to refund the amount with interest, at the rate of seven per cent., and commissions at the rate of 2½ per cent. upon the sale thereof. It was testified that the general business of the
377 Guaranty Company was to make advances upon produce and other property, and that this agreement was in the ordinary form used by it in the transaction of that business.

There are many other details contained in the printed case, but the facts above set forth impress me as those which are chiefly important to determine the controversy.

It is plain enough in the view taken by the appellant that the debt to the Guaranty Company secured by the mortgage was that of the Kerosene Company; but upon the respondent's view must we not also hold that the debt which was at the bottom of the case, and which
378 was intended to be secured by the mortgage, was the debt of the company? Did not the transaction, so far as the point before us is concerned, remain substantially as it was before a change of name or form simply?

The two transactions may be inharmonious in form, but we are to give effect to each of them so far as we are able, and to consider them in connection with the previous and with the subsequent transaction.

The mortgage bears date of April 29th, 1867, the first advance of $50,000 being made on the 15th of the preceeding February. The bond of Cozzens accompanying the mortgage states that the bond is
379 given to secure advances already made to him by the guaranty company and thereafter to be made. The bond and the mortgage were approved by the counsel of the guaranty company on the 11th day of May, 1867. On the same day was made on the bond and mortgage this endorsement:

"The New York Guaranty and Indemnity Company have this day advanced me fifty thousand dollars on the note of the New York Kerosene Oil Company, which amount is secured by this bond, $50,000. A. M. Cozzen."

This is shown to have reference to and to be the same $50,000 advanced in the month of February preceeding. It was here endorsed apparently that the bond and mortgage should show the whole transaction.

380 Then follows the endorsement, signed in like manner by Cozzens:

"NEW YORK, *May 18th*, 1867.

"The New York Guaranty and Indemnity Company have this day advanced me twenty-five thousand dollars on the note of the New York Kerosene Oil Company, which amount is secured by this bond."

On the 22nd of June is an endorsed acknowledgement of $25,000 received from the guaranty company in oil, also secured by the bond.

These three sums make up the $100,000 in suit. They were all advanced to and for the kerosene company and, except the last, upon its notes.

I cannot perceive how the inclusion of these sums in the bond
381 of Mr. Cozzens and upon a pledge of the company's note can impair the important fact that the advance was really made to the company. This proof simply shows the identity of the debts, as well as their continuance in and security by Cozzens' bond and the mortgage of the company.

But I see no difficulty in the case if we admit that the notes were pledged to the company by Cozzens, and that the mortgage was given to secure the payment of such pledged notes. The statute requires only that the mortgage should be given to secure a debt contracted by the company in its business. It is not necessary that the company should be an immediate borrower from the mortgagee. It may give its
382 mortgage to secure a debt contracted in its business, whatever be the form of the debt, and whether it is held by its original creditor or by a transferee. It would be an unreasonable distinction, and one not made by the statute, to hold that a corporation, having borrowed money or bought goods of A, might mortgage its property to secure to him the payment of such debt, not that it has no power thus to secure the debt if it has been transferred to another party. The debt of the corporation remains its debt, whether transferred or untransferred, and it is equally just, and equally for the interest of the corporation that it should be permitted to secure it in whichever form it may remain.

383 If the case was that of the transfer of certain notes on pledge, the guaranty company simply had two debtors instead of one. Cozzens, who borrowed the money, was a debtor, and the kerosene company, owing Cozzens, and giving to him its notes, was likewise a debtor. If not paid at maturity, the kerosene company was liable to a suit upon their notes by the guaranty company, to judgment, execution, and sale of all its property. Is this liability weakened? That is, do the notes become any less the debt of the kerosene company by the execution of a mortgage to secure their payment? I consider it too clear for argument that the payment by the kerosene company of these notes
384 would discharge its mortgage and the bond of Cozzens. They were the original debts upon which the guaranty company advanced the money. They continue such, and are recited to be such, throughout all the transaction.

As already stated, the $50,000.00, and the two sums of $25,000.00, each originally advanced to Cozzens, were endorsed on his bond as an advance to him, thus identifying the notes and the bond as the same debt. Each of the three advances was made upon the notes of the company except the last, which was upon a warehouse receipt. The debt of the kerosene company was the basis of the entire transaction, and the bond of Cozzens was an additional security for the same debt.

While the mortgage recites itself to be collateral to the bond of
385 Cozzens, it is quite certain that it was given to secure the debt of the company. Such is it in fact, and its language, in reciting the resolution authorizing the execution of the mortgage to secure a sum borrowed by the company, which is the sum secured by the bond of Cozzens, as well as the endorsements immediately made upon it, points to the same idea.

The authorities cited above show that the court is authorized to look through all the forms and place the case upon its real basis. In doing this, I do not doubt on either of the points, first, that the intention throughout the business was to make a loan of $100,000.00 to the
386 kerosene company, and to receive its mortgage in security there-

for, or, second, that this object was accomplished. I think the mortgage may be sustained either as upon a direct loan to the company, or as given to secure payment of its pledged notes.

I am of the opinion that the decree of the district court adjudging the mortgage to the kerosene company to be null and void, and directing the same to be cancelled and set aside, must be reversed, and that a decree be entered dismissing the bill of complaint for want of equity.

Let a decree be entered accordingly.

WARD HUNT.

387 At a stated term of the circuit court of the United States, held in and for the eastern district of New York, in the second circuit, at the U. S. court-rooms in the city of Brooklyn, on the 23rd day of June, 1877.

Present, the honorable Ward Hunt, associate justice of the Supreme Court of the United States.

Decree.

CHARLES JONES, AS ASSIGNEE IN BANKRUPTCY of the New York Kerosene Oil Company, complainant and respondent,
vs.
THE NEW YORK GUARANTY AND INDEMNITY Company, defendant and appellant. } In equity.

This cause having been brought on for hearing upon the appeal taken by the defendant, the New York Guaranty and Indemnity
388 Company, from the decree of the district court of the United States for the eastern district of New York, made on the 26th day of January, 1875, after hearing Mr. William Allen Butler and Mr. George F. Comstock for the appellants, and Mr. William G. Choate for the respondent, and due deliberation having been had, and the questions brought up by said appeal having been duly considered by the court, it is now adjudged and decreed that the said decree of the said district court of the United States made on the 26th day of January, 1877, be, and the same hereby is, reversed; and it is hereby further adjudged and decreed that the mortgage mentioned and referred to in the bill of complaint in this cause, made and executed on the 29th day of
389 April, 1867, by the said New York Kerosene Oil Company, under its corporate seal, as mortgagor, to the said defendant, The New York Guaranty and Indemnity Company, as mortgagee, upon the real estate and premises described in said mortgage, and hereinafter described, to secure the payment of the sum of one hundred thousand dollars ($100,000), a copy of which said mortgage, and of the certificates of the acknowledgement and recording thereof, is annexed to said complainant's said bill of complaint, and marked A, was and is a valid and subsisting mortgage upon the real estate of said New York Kerosene Oil Company therein described, and hereinafter described, and
390 that the same was duly made, executed, acknowledged, and delivered, pursuant to and in conformity with the provisions of the laws of the State of New York, under which said corporation, the New York Kerosene Oil Company, was organized, to secure the payment of a debt contracted by said New York Kerosene Oil Company in the business for which it was incorporated, to the said New York Guaranty and

Indemnity Company, for moneys advanced and to be advanced by said New York Guaranty and Indemnity Company to said New York Kerosene Oil Company, and which were so loaned and advanced on the faith and security of said mortgage, and amounting in the aggregate to said sum of $100,000, which said mortgage was at the time of the com-
391 mencement of this suit, and now is, a valid subsisting and prior lien upon all said real estate in favor of said New York Guaranty and Indemnity Company, and that said last mentioned company had at and before the commencement of this suit full right to have the said mortgage debt paid by a sale of said mortgaged premises, and that the said complainant, as assignee in bankruptcy of said New York Kerosene Oil Company, has and had no right, title, or interest in said mortgaged premises except subject to the lien of said mortgage, and after the payment of said mortgage debt, so far as the proceeds of sale should be sufficient for that purpose.

392 And it is hereby further adjudged and decreed that the said defendant, the New York Guaranty and Indemnity Company, is entitled to have the said mortgaged premises sold by the said assignee in bankruptcy of said New York Kerosene Oil Company, under the direction of this court, and to have the amount of said mortgage debt, with the interest thereon, paid out of the proceeds of such sale in preference to the other creditors of said bankrupt corporation, and in satisfaction of the prior lien created by said mortgage in favor of said New York Guaranty and Indemnity Company upon said mortgaged premises, and it appearing to this court that there is now due upon said mortgage for the moneys so advanced by the said New York
393 Guaranty and Indemnity Company to the said New York Kerosene Oil Company, the principal sum of $100,000.00, with interest thereon as follows, to wit: On $50,000.00 thereof, from the 11th day of January, 1868; on $25,000.00 thereof from the 18th day of December, 1867, and on $25,000.00 thereof from the 20th day of December, 1867, and said principal and interest, (after deducting the sum of twelve thousand seven hundred and $\frac{07}{100}$ dollars, a credit to which the said mortgage is entitled in account), amounting in all, at the date of this decree, to the sum of one hundred and fifty-three thousand six hundred and sixty-three $\frac{72}{100}$ dollars, it is now further adjudged and decreed that the said mortgaged premises be sold forth with, free and clear of all incum-
394 brances, by said assignee, or under his direction, at public auction, in the said eastern district of New York; that the said assignee give public notice of the time and place of such sale, according to law and the rules and practice of the court in bankruptcy in this district; that the said defendant may bid for such mortgaged premises and purchase at such sale; that the said assignee execute to the purchaser or purchasers a deed or deeds of the premises sold, and that out of the moneys arising from such sale, the said assignee, after deducting the necessary and legal e'penses thereof, and any lien or liens
395 upon the said premises so sold, at the time of such sale for taxes or assessments, pay to the said defendant, the New York Guaranty and Indemnity Company, or its attorneys, the costs and charges of said defendant in this suit, as the same shall be taxed by the clerks of the courts in which this cause is, and has been pending, with interest thereon from the date of this decree.

And that he also pay to said defendant, or its attorneys, the aforesaid amount of said mortgage debt, with interest thereon from the date of this decree, or so much thereof as the purchase money of the mortgaged premises will pay of the same.

If the proceeds of such sale be insufficient to pay the aforesaid amount hereby decreed with interest and costs as aforesaid, the said assignee shall report and certify the same to the court, specifying the amount of such deficiency, and that for the amount of such deficiency the said defendant shall have, and is hereby decreed to have, a prior and specific lien in preference to all other creditors of said bankrupt corporation, upon any and all rents, profits, or income received or derived by the said assignee, or which have come into his hands, or which he is entitled to receive from the said mortgaged premises, from and since the time of his appointment as such assignee, and that said assignee account to the said New York Guaranty and Indemnity Company therefor, and pay over the same to said company, and as to the residue of such deficiency, after applying such rents, profits, and income, if any, thereto, the said defendant shall be entitled, on proof of their claim according to the rules of the bankrupt court, to share pro rata with the unsecured creditors of said bankrupt corporation, in any distribution of the unincumbered estate or assets of said bankrupt corporation among the unsecured creditors thereof.

And it is hereby further adjudged and decreed, that said New York Kerosene Oil Company, and all persons claiming under it, or as creditors of said company, and the said complainant, and all persons claiming under him, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof.

And it is hereby further adjudged and decreed, that the said defendant, the New York Guaranty and Indemnity Company, recover against the said complainant its costs and disbursements in this suit, to be taxed as aforesaid and paid as hereinbefore directed out of the proceeds of sale of said mortgaged premises.

And it is further adjudged and decreed that either party may apply to this court at the foot of this decree for such further order and direction as may be necessary in respect to the accounting of the said assignee for rents, income, and profits of said premises.

The following is a description of the mortgaged premises hereinbefore mentioned, and it appearing that by a clerical error in the description of the said mortgaged premises, in said mortgage, one boundary line of said premises, as the same exist and were mortgaged, and were intended to be described, was omitted, it is adjudged that the said mortgage be reformed as to said description, so as to read according to said following description:

All those certain pieces or parcels of land lying together, situate in the town of Newtown, county of Queens, and State of New York, which, taken together, are bounded and described as follows, that is to say:

Beginning at a stake at the intersection of the division line between land lately belonging to Helenah Kowenhoven, and land lately belonging to the heirs of Agnes Pine, deceased, with the centre line of a street, one hundred feet wide, laid out or to be laid out, which centre line of such street, measured on such division line, is distant six hundred and sixty-seven feet easterly from the edge of the meadow on Newtown Creek, as such meadow formerly was, and running thence southeastwardly along the centre line of such street, laid out or to be laid out, four hundred and twenty-one feet and two inches, more or less, to the northerly line of land now or late of Orsamus Bushnell formerly of Paul Rapelye; thence southwesterly along such last-men-

tioned land six hundred and five feet three inches to the edge of the meadows, as formerly existing; thence continuing on the same course to the Newtown Creek; thence northwardly along Newtown Creek three hundred and twenty-seven feet and nine inches, more or less, to the division line between the land late of Helenah Kowenhoven and land late of the heirs of Agnes Pine, deceased, and thence northeastwardly along such division line eight hundred and sixty-five feet, more or less, to the place of beginning.

402 Together with the right to the land under water in Newtown Creek, in front of the above described premises, and all the water right and privileges to the said premises belonging or in any wise appertaining.

And also all that triangular piece of land situated at Dutch Kills, in Newtown, Queens County, and State of New York, and bounded as follows: Beginning at a point on the easterly side of Newtown Creek, adjoining land heretofore conveyed by Neziah Bliss and Samuel Sneden and their respective wives to Erastus W. Smith, and late of the North American Kerosene Gas light Company, running thence northeasterly along the said land, late of the said company, to a point where the

403 same is intersected by the centre line of First street, as said street is laid down on a certain map filed in the clerk's office of Queens County, entitled "Map of the farm of Francis and Eve Duryea, situated on the Newtown and Dutch Kills Creeks, in Newtown, Queens County, as surveyed, and a portion thereof laid out into lots for Neziah Bliss and Samuel Sneden by Van Alot and Meserole, city surveyors, May, 1856," thence westerly along the centre line of said street to the easterly side of Newtown Creek, and thence southerly along Newtown Creek to the place of beginning; together with the right to the

404 land under the waters of Newtown Creek in front of said last described premises.

(Endorsed:) Decree.

I approve of the within decree and direct the same to be entered. June 23rd, 1877.

WARD HUNT.

Filed and entered the 27th day of June, 1877.

B. LINCOLN BENEDICT,
Clerk.

405 Circuit court of the United States for the eastern district of New York, in the second circuit.

CHARLES JONES, AS ASSIGNEE IN BANKRUPTCY of the New York Kerosene Oil Company, complainant and app'l't,
vs.
THE NEW YORK GUARANTY AND INDEMNITY Company, defendant and appellee.

To the honorable the Supreme Court of the United States:

The appeal of Charles Jones, as assignee in bankruptcy of the New York Kerosene Oil Company, the above-named complainant and appellant, respectfully shows:

That on or about the 28th day of September, 1869, this appellant filed his bill of complaint in the district court of the United

406 States for the eastern district of New York, against the above-

named defendant and appellee, alleging, among other things, that on or about the 28th day of July, 1860, the said The New York Kerosene Oil Company, a corporation duly organized under the laws of the State of New York, purchased and became the owner in fee of certain real estate situated in the county of Queens, in said State, and described in said bill, and continued to own the same in fee until the same was assigned and conveyed to the said complainant, this appellant, as thereinafter stated; that thereafter and on or about the 16th day of June, 1868, the said The New York Kerosene Oil Company was, upon its own petition, adjudged and declared a bankrupt by said district court, and this appellant was appointed assignee in bankruptcy of said corpora-
407 tion, and qualified for and accepted said trust, and that thereafter and on the 8th day of September, 1869, all the property, real and personal, of said bankrupt corporation, including the real estate aforesaid, was by deed of assignment conveyed to and vested in the appellant.

That the above-named defendant and appellee, The New York Guaranty and Indemnity Company, a corporation created and existing by virtue of an act of the legislature of the State of New York, claimed to have some interest in or lien upon said real estate by virtue of a certain alleged mortgage thereof, purporting to have been made to the above-named appellee on or about the 29th day of April, 1867, on behalf of said bankrupt corporation, and under its corporate seal by its
408 president and secretary, to secure payment to said appellee of one hundred thousand dollars and interest, and that the above-named appellee had commenced proceedings in the supreme court of the State of New York to foreclose said mortgage; the said complainant further alleging, for the reasons set forth in said bill, that said alleged mortgage never was a valid and subsisting lien upon said real estate, and praying that said mortgage might therefore be adjudged and declared to be wholly invalid and void, that said real estate might be sold by said assignee, this appellant, under the order and decree of said district court and the proceeds of sale disposed of according to the rights of the several parties claiming an interest therein; and that the above-
409 named appellee might be perpetually enjoined and restrained from further prosecuting said action to foreclose said mortgage, as by reference to said bill will more fully appear.

That on or about the 4th day of February, 1870, the above-named appellee filed its answer to the said bill of complaint in said district court, alleging among other things, for the reasons set forth in said answer, that said alleged mortgage was operative and valid and was a subsisting and prior lien upon said real estate, and that there was justly due and owing to said appellee thereunder the sum of one hundred thousand dollars and interest, and praying, among other things, that by a decree of said district court the validity and priority of said al-
410 leged mortgage might be established and said debt declared to be due, and this appellant decreed to be liable to pay the same out of the proceeds of the sale of said real estate or to hold said real estate subject to the lien of said alleged mortgage, as by reference to said answer will more fully appear. That the said cause came on to be heard before the honorabe Charles L. Blenedict, judge of the said district court, on the 22nd, 23rd, 24th, 28th, and 29th days of January, and the 4th, 5th, 6th, 12th, and 19th days of February, 1873, upon the testimony and proof adduced by the respective parties, and on the 26th day of January, 1875, the said court made its final decree, among other things adjudging the said alleged mortgage to be wholly null and void

411 and cancelling the same and declaring it to be of no effect, and that the above-named appellee had not thereby any lien upon or interest in said real estate, and enjoining said appellee from taking any measures whatever to foreclose said alleged mortgage and from transferring or assigning the same and further adjudging that this appellant recover against the above-named appellee his costs and disbursements in the suit, as by reference to said decree will more fully appear.

That thereupon the above-named appellee, feeling aggrieved by said judgment or decree of the district court, appealed therefrom to the circuit court of the United States in and for the eastern district of New York, in the second circuit, and from each and every part thereof;

412 and thereafter and on the 22nd and 23rd days of May, 1877, the said cause came on to be heard before the honorable Ward Hunt, one of the associate justices of the Supreme Court of the United States, sitting as a circuit judge in the city of Brooklyn, in said eastern district of New York, in said circuit, upon the allegations and proofs adduced by the respective parties, which had been transmitted to said circuit court upon said appeal. And the said associate justice, sitting as a circuit judge, having advised thereon, thereafter, and on the 23rd day of June, 1877, made and entered his decree in the said circuit court and filed the same with the clerk of said court, adjudging and decreeing, among other things, that the said decree of the district court

413 made and entered as aforesaid on the 26th day of January, 1875, be reversed.

That the said alleged mortgage was and is a valid, subsisting, and prior lien upon said real estate of the said The New York Kerosene Oil Company, and was duly made, executed, acknowledged, and delivered by said company pursuant to the laws of the State of New York, to secure payment to the said appellee of said sum of one hundred thousand dollars and interest, and that this appellant never had any right, title, or interest in or to said real estate, except subject to the lien of said mortgage; that the said appellee is entitled to have said mortgaged

414 premises sold and the amount of said debt, with interest, amounting, at the date of said decree, to the sum of one hundred and fifty-three thousand six hundred and sixty-three dollars and seventy-two cents ($153,663\frac{72}{100}$), paid to it out of the proceeds of such sale in preference to the other creditors of said bankrupt corporation, and that said mortgaged premises be sold forthwith in the manner prescribed by said decree, and the said debt paid to said appellee, so far as the proceeds of such sale will pay the same, after paying any taxes and assessments which may be a lien upon said premises, and the costs and expenses of the said defendant in this action, and the expenses of

415 such sale, and further adjudging and decreeing that should the proceeds of such sale be insufficient, after payment of the amounts therein decreed to be paid as above set forth, that then the said appellee shall have a prior and specific lien for such deficiency upon any and all rents, profits, and income received by this appellant, or which he may be entitled to receive from the said mortgaged premises, since his appointment as assignee as aforesaid, in preference to all other creditors of said bankrupt corporation, and that, if there should still remain a deficiency, after applying all of said rent, income, and profits, that then the said appellee shall be entitled, upon proper proof of its claim,

416 to share, pro rata, with the unsecured creditors of said bankrupt corporation in any distribution of its unincumbered assets among its unsecured creditors, with certain other and further relief in the prem-

ises, as by reference to said decree will more fully appear. And this appellant is advised and insists that the said last-mentioned decree is erroneous, inasmuch as the aforesaid decree of the said district court should have been affirmed by the said circuit court with costs to this appellant.

Wherefore, this appellant appeals from the whole and each and every part of said decree of said circuit court, and respectfully prays that the said decree of the said circuit court and the bill, answer, plead-
417 ings, depositions, evidence, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said circuit court, and every part thereof, may be reversed and a decree made in favor of this appellant, according to the prayer in said bill, or that such other decree may be made as to the said Supreme Court shall seem just, and that the said defendant and appellee may be condemned to pay to this appellant his costs and damages in the premises.

Dated Aug. 13th, 1877.

E. A. CARLEY,
Sol'r for Compl't and Appel't.
WM. G. CHOATE,
Of Counsel.

418 (Endorsed:) Petition of appeal to U. S. Supreme Court.

I hereby allow the within appeal.
Dated August 15th, 1877.

ALEX. S. JOHNSON,
U. S. Circuit Judge.

Service of a copy of the within petition of appeal is hereby admitted this 20th day of August, 1877.

BUTLER, STILLMAN, AND HUBBARD,
Sol'rs for Appellees.

Filed August 20th, 1877.

419, 420 Supreme Court of the United States.

CHARLES JONES, AS ASSIGNEE IN BANKRUPTCY of the New York Kerosene Oil Company, appellant,
against
THE NEW YORK GUARANTY AND INDEMNITY Company, appellee.

Know all men by these presents that we, Charles Jones as assignee in bankruptcy of the New York Kerosene Oil Company, Ira W. Gregory, of the city of Brooklyn, New York, and Benjamin F. Tracy, of the same place, are held and firmly bound unto the New York Gua'n'ty and Indemnity Company, the above-named appellee, in the sum of five hundred dollars, to be paid to the said The New York Guaranty and Indemnity Company or its successors, to which payment, well and truly to
421, 422 be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 13th day of August, 1877.

Whereas the above-named Charles Jones, as assignee in bankruptcy of the New York Kerosene Oil Company, hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled action by the circuit court of the United States, held in and for the eastern district of New York, in the second circuit, on the 23d day of June, 1877:

Now, therefore, the condition of this obligation is such, that if the above-named Charles Jones, as assignee, &c., as aforesaid, shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

423, 424

CHARLES JONES, [SEAL.]
Assignee, &c.
J. W. GREGORY. [SEAL.]
B. F. TRACY. [SEAL.]

Sealed and delivered in the presence of—
FRED. E. CLEVELAND.

STATE OF NEW YORK,
City & County of New York, ss:

On this 13th day of August, 1877, before me personally came Charles Jones, assignee in bankruptcy of The New York Kerosene Oil Company, & Ira W. Gregory, and on this 14th day of August, 1877, before me personally came Benjamin F. Tracy, known to me to be the individuals in and who executed the foregoing bond, and they severally acknowledged before me that they executed the same.

FRED. E. CLEVELAND,
Notary Public, Kings Co., N. Y.

STATE OF NEW YORK,
City & County of New York, ss:

Ira W. Gregory and Benjamin F. Tracy, being duly sworn, depose and say, & each for himself says that he resides in the
425 city of Brooklyn, Kings County, New York, and is worth the sum of one thousand dollars over and above all his just debts and liabilities, not including property exempt by law from execution.

J. W. GREGORY.
B. F. TRACY.

Sworn to before me by the said Ira W. Gregory this 13th day of August, 1877, & by the said Benjamin F. Tracy this 14th day of August, 1877.

FRED. E. CLEVELAND,
Notary Public, Kings Co., N. Y.

(Endorsed:) Bond for costs.

I approve the within bond as to amount, manner of execution, and sufficiency of the sureties.

Dated Aug. 15, 1877.

ALEX. S. JOHNSON,
U. S. Cir. Judge.

Filed August 20th, 1877.

423 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, B. Lincoln Benedict, clerk of the circuit court of the United States

of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from (1) one to four hundred and twenty-five inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Charles Jones, as assignee of the New York Kerosene Oil Company, respondent, v. The New York Guaranty and Indemnity Company, appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in said district and circuit, this day of October, A. D. 1877.

[SEAL.] B. LINCOLN BENEDICT,
Clerk.

427 U. S. circuit court, eastern district of N. Y., in the 2d circuit.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY of the New York Kerosene Oil Co., appellant,
against
THE NEW YORK GUARANTY AND INDEMNITY Company, appellee.

We hereby waive the issuing and service upon us of a citation upon the appeal to the Supreme Court of the United States in this cause.

Dated New York, October 5th, 1877.

BUTLER, STILLMAN & HUBBARD,
Att'ys for Def't & Appellee.

(Indorsed:) U. S. circuit court east. dist. of N. Y. Charles Jones, assignee, &c., app'll't, vs. The New York Guaranty & Indemnity Company, appellee. Waiver of citation upon appeal.

(Indorsement on cover:) No. 264. Charles Jones, assignee of the New York Kerosene Oil Company, appellant, vs. The New York Guaranty and Indemnity Company. E. New York C. C. U. S. Filed 10th October, 1877.

SUPREME COURT of the UNITED STATES.

CHARLES JONES, AS ASSIGNEE OF THE NEW YORK KEROSENE OIL COMPANY,

Appellant,

vs.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,

Respondent.

BAR ASSOCIATION

Brief and Points for Appellant.

B. F. TRACY,
Of Counsel for Appellant.

NEW YORK:
EVENING POST STEAM PRESSES, 208 BROADWAY, CORNER FULTON STREET.

1880.

Supreme Court of the United States.

CHARLES JONES, AS ASSIGNEE IN BANKRUPTCY OF THE NEW YORK KEROSENE OIL COMPANY,
Appellant,

against

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
Appellee.

Brief and Points for Appellant.

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of New York, in the Second Circuit.

Proceedings.

Charles Jones, as assignee in bankruptcy of the New York Kerosene Oil Company, a bankrupt corporation, filed a petition in the District Court of the United States for the Eastern District of New York, on the 13th day of January, 1869, to enjoin the New York Guaranty and Indemnity Company from proceeding in an action commenced by it in the Supreme Court of the State of New York for the foreclosure of a mortgage on the property of the bankrupt corporation.

On the 27th of September, 1869, an order was made by the Circuit Court that said assignee have leave to amend his said petition so as to make the same a bill in equity, and that said

New York Guaranty and Indemnity Company answer or plead to such bill.

(See Order, folios 1 and 2.)

Under that order the said assignee filed his bill of complaint in said District Court on the 28th day of September, 1869 (fols. 3–20).

The Guaranty and Indemnity Company filed its answer to this bill of complaint on the 4th day of February, 1870 (fols. 20–32).

The cause was brought on for hearing in the District Court, and having been submitted upon the pleadings and proofs, the judge of said court, on the 12th of December, 1874, rendered his decision therein (fols. 326–335).

On the 26th of January, 1875, a decree was entered in the cause in the District Court, adjudging that the mortgage was not a lien upon the property of the bankrupt corporation, and enjoining the Guaranty and Indemnity Company from proceeding to foreclose the same (fols. 336–341).

From that decree the defendant appealed to the Circuit Court (fol. 341, &c.), where, on the 27th of June, 1877, a decree was made and entered reversing the decree of the District Court, and directing that the mortgaged property be sold, and the proceeds, with the rents, be applied to the payment of the debt due to the defendant, as found and determined by the court (fols. 338–405).

From this decree of the Circuit Court the assignee has appealed to this court (fol. 405, &c.).

Pleadings.

The *bill of complaint*, after setting forth the order under which the same was filed, states in substance the following facts:

1. That the New York Kerosene Oil Company was a corporation organized and established under the laws of the State of New York, and on or about the 28th of July, 1860, it purchased and became the owner in fee of certain real estate in the bill particularly described, and that it continued to own

such real estate until the same was assigned and conveyed to the complainant in the bankruptcy proceedings set forth in the bill.

2. That on the 16th of June, 1868, that company was duly adjudged a bankrupt by said District Court; that on the 8th of September, 1868, the complainant was appointed and qualified as assignee, and on the same day all the property of the company, including said real estate, was assigned and conveyed to him as such assignee; and that he thereupon entered into the possession and holds possession thereof.

3. That the New York Guaranty and Indemnity Company, a corporation created by the laws of the State of New York, claims to have some interest in or lien upon said real estate by virtue of an alleged mortgage purporting to have been executed on behalf of the bankrupt corporation on the 29th April, 1867 (of which a copy is annexed, at fol. 13), which claim is adverse to the interest of the complainant.

4. That said Guaranty Company, on the 10th October, 1868, commenced an action against the complainant in the New York Supreme Court for the foreclosure of said mortgage, and to have the same adjudged a valid lien upon the real estate, and to have the same sold, and the proceeds applied to the payment of an alleged indebtedness of the Kerosene Company to the Guaranty Company of $100,000; that the Guaranty Company had also given notice that it would move that court for the appointment of a Receiver *pendente lite;* and that this complainant had not appeared in said action nor submitted himself or the subject matter of the action to the jurisdiction of said Supreme Court.

5. That the alleged mortgage was not a valid mortgage or a subsisting lien upon said real estate; that by the laws of New York, under which the Kerosene Company was organized, that company was authorized to mortgage its real estate only to secure the payment of debts contracted by it in the business for which it was incorporated, and on filing the written assent thereto of the stockholders owning, at least two-thirds of its capital stock in the office of the clerk of the county where the

real estate was situated; that the alleged mortgage was not made and executed in the form and manner, nor for the purpose authorized by law, nor with the consent of the Kerosene Oil Company; that the persons signing the mortgage had no authority to make and execute the same in the name or under the seal of that company; that it was not made to secure the payment of any debt contracted by said company in its business; and that the written assent of stockholders owning two-thirds of its capital stock was not given nor filed, and, if given for any debt, the debt was provable in the bankruptcy proceedings.

6. That said mortgage was, in fact, given to secure a certain bond of Abraham M. Cozzens therein referred to (of which a copy is annexed, fol. 18, &c.); that the Guaranty Company never loaned or advanced to the Kerosene Company any money upon the security of the mortgage; that none of the moneys advanced to Cozzens had ever come to the hands of the Kerosene Company or the complainant; and that the loan to Cozzens was usurious.

7. That after the date of execution and registering of the mortgage, the Kerosene Company contracted debts in its business exceeding $50,000, provable, and some of which have been proved against the estate in bankruptcy, and that they were contracted upon the faith and credit of said real estate, on which there was no legally executed mortgage.

8. That the property yields no revenue, and is a large expense, and cannot be sold, subject to the rights claimed by the Guaranty Company, under the mortgage, for a fair price, and complainant is willing that any amount for which the Guaranty Company holds any mortgage be paid out of the proceeds.

9. The prayer for relief is that the mortgage be declared void, or that the amount secured thereby, if any, be determined by the court, and that said real estate be sold under the decree of the court, and the proceeds disposed of according to the rights of all parties, and that the Guaranty Com-

pany be enjoined from proceeding with the action in the Supreme Court, or any action for foreclosing the mortgage.

Bill of Complaint, fols. 3–12.

The answer of the New York Guaranty & Indemnity Company, after admitting the filing of complainant's petition, the order changing the petition into a bill, the ownership by the Kerosene Oil Company of the real estate mentioned in the bill, the entering into possession thereof by complainant, the claim of said Guaranty Company to a lien on said premises under the mortgage mentioned in the bill, the commencement of a foreclosure action on said mortgage, and the application for a Receiver, denies, substantially, all the other material allegations contained in the bill.

Said answer then sets up as a further defense :

1. That the Kerosene Oil Company was incorporated under Act of February 17th, 1848, and was engaged in the business of manufacturing and refining kerosene oil on said real estate.

2. That the said real estate was purchased from a Receiver by certain parties, who organized the Kerosene Oil Company, and said real estate was represented by the capital stock of said company, and constituted its principal property for the purpose of its business.

3. That, at the formation of said company, Abraham M. Cozzens was authorized by all the stockholders to carry on the business of the company, and to manage its affairs, financial and otherwise. That said Cozzens owned large amounts of said company's stock, and, before the making of said mortgage, was the owner of nearly all its stock. That he was president of said company from 1864 to his death, in 1868. That, from its organization down to the time of making said mortgage, said Cozzens, or his firm, Cozzens & Co., with assent of all said company's Trustees and stockholders, managed the financial affairs of said company, and made purchases and sales therefor, and borrowed money and pledged property of the company therefor, and made all arrangements necessary to carry on the company's business, according to his discretion, and by use of the means and credit of said company, or of

himself, or of his firm. That the moneys of said company were received, and its disbursements and debts paid, by said Cozzens, or Cozzens & Co. That the financial affairs and accounts of said company were kept in Cozzens & Co.'s books. That though formally the company was kept in existence, the business thereof was transacted by A. M. Cozzens. That the nominal Trustees of said company, when said mortgage was made, were said Abraham M. Cozzens, James E. Kelley, his brother-in-law, with 5 shares, Francis H. Cozzens, his son, with 50 shares, Thomas H. Cozzens, his son, with no shares, George W. Austen, with 2 shares, and Charles L. Wheeler, having 5 shares.

4. That, before the making of said mortgage, said Abraham M. Cozzens made application to the defendants to make advances to said Kerosene Oil Company, on security of the property of said company, to enable it to carry on its business. That he first requested such advance on the promissory notes of said Kerosene Oil Company for $50,000, payable to order of Cozzens & Co.; and said Cozzens thereupon stated to defendant that he was owner of nearly all the capital stock of said company, was carrying on its business, that the company was largely indebted to him or his firm, for moneys disbursed for said company, exceeding $100,000, that said note was for part of that debt, that in its business said company needed large advances, and, if defendant would make them, said company would secure them by a mortgage on its real estate; that such statements were repeated when subsequent advances were made; that they were true when made.

5. That on the faith of said representations, and on the faith of the security of said mortgage to be made and executed, defendant agreed to make, and did make, loans on promissory notes of said Kerosene Oil Company, for $50,000 and $25,000, and on warehouse receipts for $25,000. That as security for said advances said mortgage was executed. That the legal requirements as to said mortgage were complied with. That the bond was the bond of said Cozzens, executed in accordance with the company's resolution. That the mortgage, was given to secure the company's debt. That defendant is owner of said mortgage, and there is due thereon a specified amount.

Answer, original pages 20–32.

Statement of the Case.

1. The New York Kerosene Oil Company was incorporated under and in pursuance of an act of the Legislature of the State of New York, entitled "An Act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, and the acts amendatory thereof, for the manufacturing and selling oil and burning and lubricating fluids. The number of Trustees was six.

Complainant's Exhibit A, pages 136–7.

The provisions of this statute, so far as they affect any question involved in this case, are as follows:

SEC. 1. At any time hereafter any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, may make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the Clerk of the County in which the business of the company shall be carried on, and a duplicate thereof in the office of the Secretary of State, a certificate, in writing, in which shall be stated the corporate name of the said company and the objects for which the company shall be formed, the amount of the capital stock of said company, the term of its existence, not to exceed fifty years, the number of shares of which the said stock shall consist, the number of trustees and their names, who shall manage the concerns of said company for the first year, and the names of the town and county in which the operations of the said company shall be carried on.

Sec. 2. When the certificate shall have been filed, as aforesaid, the persons who shall have signed and acknowledged the same and their successors shall be a body politic and corporate, in fact and in name, by the name stated in such certificate, and shall be capable of suing and being sued in any court of law or equity in this State, and they and their successors may have a common seal, and may make and alter the same at pleasure; and they shall, by their corporate name, be capable

in law of purchasing, holding, and conveying, any real estate whatever which may be necessary to enable said company to carry on their operations named in such certificate, but shall not mortgage the same, or give any lien thereon.

Sec. 3. The stock, property, and concerns of such company shall be managed by not less than three, nor more than nine trustees, who shall respectively be stockholders in such company, and citizens of the United States, &c., &c.

Laws of N. Y., 1848, chap. 40, p. 54.

In 1864 this act was amended, and corporations formed under it were authorized to mortgage their real estate for certain specified purposes, as follows:

Sec. 2. Any corporation formed under the said act, passed February seventeen, eighteen hundred and forty-eight, or of the acts amending or extending the said act, may secure the payment of any debt heretofore contracted, or which may be contracted, by it in the business for which it was incorporated by mortgaging all or any part of the real estate of such corporation; and every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate; provided that the written assent of the stockholders owning at least two-thirds of the capital stock of such corporation, shall be first filed in the office of the Clerk of the County where the mortgaged property is situated.

Laws of 1864, chapter 517, pages 1154–5.

2. A mortgage was executed on behalf of the Kerosene Oil Company by George W. Austen, Secretary, and Abraham M. Cozzens, President, originally dated the 9th day of March, 1867, the date of which was changed to the 29th day of April, 1867, and a bond was also executed by Abraham M. Cozzens, bearing the same date.

The mortgage is as follows:

"This indenture, made the 29th day of April, in the year "1867, between The New York Kerosene Oil Company, &c., "of the first part, and the New York Guaranty and Indemnity "Company, &c., of the second part.

"Whereas, at a regular meeting of the Board of Trustees of "the said The New York Kerosene Oil Company, held on the "ninth day of March, 1867, it was resolved that Abraham M. "Cozzens, the president of said company, be authorized to "borrow a sum not to exceed one hundred thousand dollars, "and to secure the same to execute a mortgage upon the fac- "tory and premises of the said company at Newtown, Queens "County, Long Island.

"And whereas the said Abraham M. Cozzens has made and "delivered to said parties of the second part, his certain bond "or obligation, bearing even date with these presents in the "penal sum of one hundred thousand dollars, lawful money of "the U. S. of America, which said bond declares that the same "is given to secure advances to be made by the said party of "the second part, to the said Abraham M. Cozzens, in all not "to exceed the sum of one hundred thousand dollars, upon "certain conditions therein contained, as by reference to said "bond will more fully appear, and the consent of the stock- "holders of said party of the first part, having been first duly "given and filed pursuant to law and recorded herewith. "Now, this indenture witnesseth, that the said parties of the "first part, for the better securing the payment of the said "sum of money mentioned in the condition of the said bond, "or obligation, with interest thereon, according to the true "intent and meaning thereof, and also for and in consideration "of the sum of one dollar, to them in hand paid by the said "party of the second part, at and before the ensealing and "delivery of these presents, the receipt whereof is hereby "acknowledged, have granted, bargained, sold, &c., unto the "said party of the second part, and to their successors and "assigns for ever." [Here follows description of property and usual habendum in fee.] "Provided always, and these pre- "sents are upon the express condition, that if the said parties "of the first part, their successors or assigns, shall well and "truly pay unto the said parties of the second part, their suc- "cessors or assigns, the said sum of money mentioned in the "condition of the said bond or obligation, and the interest "thereon, at the time, and in the manner mentioned in said "condition, according to the true intent and meaning thereof, "that then these presents and the estate hereby granted shall "cease, determine and be void. And the said Abraham M.

" Cozzens, for himself, his heirs, executors and administrators " doth covenant and agree to pay unto the said party of the " second part, their successors or assigns, the said sum of " money, and interest, as mentioned above, and expressed in " the condition of the said bond." [Then follows the usual clause for entry and sale in case of default.]

See Mortgage, page 167.

The bond of A. M. Cozzens, bearing the same date as the mortgage, is as follows :

" Know all men by these presents, that I, Abraham M. Coz- " zens, of the City of New York, am held and firmly bound " unto the New York Guaranty and Indemnity Company, in " the sum of one hundred thousand dollars, lawful money of the " United States of America, to be paid to the said New York " Guaranty and Indemnity Company, their successors and " assigns, for which payment well and truly to be made, I bind " myself, my heirs, executors and administrators firmly by " these presents. Sealed with my seal. Dated the 29th day " of April, 1867.

" This bond is to cover advances of money, now or hereafter " to be made by the said New York Guaranty and Indemnity " Company to the said Abraham M. Cozzens, for the sum of " one hundred thousand dollars, or any less amount, upon the " condition that whenever any sum shall be advanced on this " bond by the said The New York Guaranty and Indemnity " Company to the said Abraham M. Cozzens the amount of " such advance, and the date of the same shall be endorsed on " this instrument, and signed by the said Abraham M. Coz- " zens ; and when the same, or any part thereof, shall be paid, " such payment shall be endorsed on or under such statement " of advance ; and the amount which shall at any time appear " by said endorsements of advance and payment to be then " due, shall be taken and considered as the true amount due " on said bond, and for which the premises which have this " day been conveyed to the said The New York Guaranty and " Indemnity Company, by the New York Kerosene Oil Com- " pany, by indenture of mortgage, bearing even date herewith, " shall be held liable, and for no greater sum.

" (Signed),

" A. M. Cozzens." [L. S.]

The following endorsements appear on the bond:

"NEW YORK, May 11th, 1867.

"The New York Guaranty and Indemnity Company have "this day advanced me fifty thousand dollars on the note of "the New York Kerosene Oil Company, which amount is "secured by this bond.

"A. M. COZZENS."

"NEW YORK, May 18th, 1867.

"The New York Guaranty and Indemnity Company have "this day advanced me twenty-five thousand dollars, on the "note of the New York Kerosene Oil Company, which amount "is secured by this bond.

"A. M. COZZENS."

"NEW YORK, June 22d, 1867.

"The New York Guaranty and Indemnity Company have this "day advanced me twenty-five thousand dollars on oil, which "amount is secured by this bond.

"A. M. COZZENS"

(See bond and endorsements, pages 166–167.)

The principal facts extrinsic to the bond and mortgage, are as follows:

1. At about the time of the incorporation of said company, the firm of Cozzens & Co., consisting of Abraham M. Cozzens and his son Thomas M. Cozzens, was formed (pages 55 and 58). The business of that firm was dealing in oils. It did business for the Kerosene Oil Company, and also did a large business in oils outside of the business of that company (pages 28 and 29).

2. The Kerosene Oil Company had its manufactory at Hunter's Point, on the real estate in question. Its office was at the office of said Cozzens & Co. (page 59). The books of the company were kept at that office, and the company had a regular set of books (page 23). The company kept a bank account until some time in 1864, in which year it was closed (page 124). In those books of the company everything relating to its busi-

ness was entered (page 27). The particulars of transactions at the manufactory were kept by an employee named Waller who brought them to the said office (page 26).

3. The business of the Kerosene Oil Company was buying petroleum, refining the same and selling the refined oil (page 27). It also earned some money from hiring out a steam tug and lighters. Its receipts were all from those two sources (page 34). Its disbursements were for crude oil, labor, materials and repairs.

4. The firm of Cozzens & Co., bought all the crude material used by the Kerosene Oil Company (page 36), and sold the refined oil in the name of the firm (page 34). The firm charged the company interest on all advances, and a commission of seven and one-half per cent on all sales (page 35). The firm kept in its books one account of the Kerosene Oil Company, debit and credit (page 4). In that account the firm made entries at the end of each month crediting the company with the proceeds of sales and charging it with disbursements, interest and commission (page 35). After 1864, moneys received on account of the company went into Cozzens & Co.'s bank account (page 125). During 1867 the Kerosene Oil Company was indebted to Cozzens & Co. largely (page 135), and from February 28th to June 30th, 1867, this indebtedness was larger than $100,000 (page 128).

5. Abraham M. Cozzens was the largest stockholder in the Kerosene Oil Company, and for several years prior to the year 1867, was its president. In April, 1867, George W. Austen was its secretary. On February 15th, 1867, Abraham M. Cozzens held 3,590 shares of the company's stock out of a total 5,000. The balance of the stock was held then as follows: A. E. Cooper, 273 shares; Eli Kelley, 65; A. S. Hewitt, 273; Peter Cooper, 694; F. H. Cozzens, 50; Charles L. Wheeler, 5; James E. Kelley, 5; G. W. Austen, 2; James Austin, 43. There was no change in that ownership during 1867, except that of James E. Kelley's shares, 1 was transferred to John Perkins, 1 to Ogden Haggerty, 1 to John H. Hall, and 1 to F. H. Cozzens (page 45–6).

6. In carrying on their business, as well that which they did on their own account, as that which they did on account of the Kerosene Oil Company, Cozzens & Co. required large sums of money (page 29). Abraham M. Cozzens managed the business (page 59).

7. In the order of their dates, as the records show them, the following events then occurred :

February 15th, 1867. Abraham M. Cozzens applied to the Guaranty and Indemnity Company, for a loan or advance.

February 15th, 1867. The Guaranty and Indemnity Company loaned or advanced $50,000 on security, as appears by their books, to the consignor, Cozzens & Co., on a note of the N. Y. Kerosene Oil Company for $50,000 to the order of Cozzens & Co., and endorsed by that firm (see note, page 87). At that time a contract of the form of Exhibit G (p. 169), was taken (pages 93, 95, 96), signed by A. M. Cozzens.

February 15th, 1867. The Guaranty and Indemnity Company, gave a check for $49,250, being the $50,000 loan less the commission &c., to order of Cozzens & Co. (page 106).

February 15th, 1867. This check was deposited in the bank account of Cozzens & Co., to that firm's credit (page 127).

February 15th, 1867. At opening of business, Cozzens & Co's account at bank was overdrawn $20,873.96, of which $15,000 went to pay a loan of Maitland, Phelps & Co. (pages 126–7). On the 15th February the firm deposited check of Guaranty Company for $49,250, and check from Kirkland & Van Sachs for $15,000, making $64,250 (page 127). Against that were drawn checks for $5,346 on account of N. Y. Kerosene Oil account, G. C. Gibbs; for $203.61 for A. M. Cozzens; for $21,036.17 to pay money borrowed from Stone, Nichols & Co., and Kirkland & Von Sachs; for $75; for J. M. M. Fowler, $25; for J. W. Austin, Trustee, $50; leaving in bank $16,715.27. Against this on February 16, before any deposit had been made, a check to Kirkland & Von Sachs for $15,002.91 was drawn to repay the deposit of their check for $15,000, made on February 15th (page 128).

March 8th, 1867. A meeting of the Trustees of the Kerosene Oil Company was held, at which were present only A. M. Cozzens, F. H. Cozzens, and G. W. Austen, as appears by minutes

(page 185), and then T. H. Cozzens was elected Trustee, as appears by minutes (page 185).

March 9th, 1867. A meeting of the Trustees was held, at which were present, A. M. Cozzens, F. H. Cozzens, G. W. Austen and Thomas H. Cozzens (page 185), and it was resolved that the president be authorized to execute a mortgage for the sum of $100,000 on their factory and works and to affix the seal of the corporation thereto, as appears by the minutes (page 186).

April 16th, 1867. The loan of $50,000 came due and was renewed (Ex. L, page 173).

April 29th, 1867. The consent of Abraham M. Cozzens, as stockholder of Kerosene Oil Company, to making a mortgage for $100,000 to Guaranty Company, filed (Ex., page 175).

April 29th, 1867. Date of bond of Abraham M. Cozzens to Guaranty Company for $100,000 (Ex. B, page 166-7).

April 29th, 1867. Date of the mortgage in question (Ex. A, page 164).

May 7th, 1867. Date of acknowledgment of the mortgage in question (page 167).

May 11th, 1867. The loan of $50,000 was renewed (Ex. L, page 173), credited to A. M. Cozzens on a note (Ex. L).

May 11th, 1867. An endorsement on the said bond of Cozzens that the Guaranty Company had that day advanced to him $50,000 on note of New York Kerosene Oil Company, signed by A. M. Cozzens individually (page 167).

May 18th, 1867. The Guaranty and Indemnity Company loaned and advanced $25,000, as appears by their register, to A. M. Cozzens on a note (Ex. L, page 173).

May 18th, 1867. The Guaranty Company took, in regard to that loan, a paper signed by A. M. Cozzens, similar to Exhibit H, page 170 (page 95).

May 18th, 1867. The Guaranty Company took a receipt on said bond of Cozzens for $25,000, advanced to him, signed by Cozzens individually (page 167).

May 18th, 1867. The check for said $25,000 advance was made by the Guaranty Company to the order of A. M. Cozzens (page 107).

May 18th, 1867. The bank account of Cozzens & Co. at opening of day had credit of $285.01. On that day they deposited the Guaranty Company's check for $24,639.58, the amount of the advance, less commission, and sufficient more to

make the amount in bank $38,823.56 (page 127). Against that they drew, on May 18th, as follows:

Note of Cooper, Hewitt & Co	$10,015 38
Shipment per *Pathfinder*	9 78
New York Kerosene Oil Company; H. Barber, cartage	25 50
Account New York Kerosene Oil Company for Turnbull, McBain & Co	155 85
New York Kerosene Oil Company to T. Merrifield & Co	1,500 00
New York Kerosene Oil Company; J. F. Waller, to pay men	1,250 00
Stone, Nichols & Stone	15,000 00
Aymer & Co., loan, with interest	10,013 61

Leaving a balance on that day of $1,048.25 (p. 128).

June 20th, 1867. The loan of $25,000 came due and was renewed, with the note of New York Kerosene Oil Company as collateral (Exs. L and M, pages 173 and 174).

June 22d, 1867. The Guaranty and Indemnity Company loaned or advanced, as appears by their register, $25,000 to A. M. Cozzens, on 10,000 barrels of crude petroleum as security, in warehouse of New York Kerosene Oil Company (Exhibit M, page 174).

June 22d, 1867. The Guaranty Company took from A. M. Cozzens in regard to that loan a paper similar to Exhibit K, page 171 (pages 93 and 95).

June 22d, 1867. The Guaranty Company took a receipt on the said bond of A. M. Cozzens, signed by Cozzens individuaally, that it had advanced $25,000 to him (page 167).

June 22d, 1867. The check for said $25,000 advance was made by the Guaranty Company to the order of A. M. Cozzens (page 107).

June 22d, 1867. The bank account of Cozzens & Co. at opening of day was overdrawn $739.70; on that day they deposited check of Guaranty Company, $25,000 (there is a mistake in printed case by which $5,000 is put for $25,000), and Kirkland and Von Sachs $2,500, making in all $27,500 (page 127). Against that they drew, on June 22d, 1867, as follows:

New York Kerosene Oil Company, paid W. H. & A. W. Allen	$95 00
A. M. Cozzens	100 00
L. F. Mack	800 16
Edward Cozzens & Co	1,000 00
New York Kerosene Oil Company; Le Compt & Perkins	1,640 00
Francis Skiddy	10,005 83
New York Kerosene Oil Company; Watson, Densmore & Co	3,000 00
Aymar & Co	10,005 83
A. M. Cozzens	50 00

Leaving a balance of $63.48 (page 129).

There were renewals of those loans or advances from time to time, as shown by Exhibit M, page 174.

8. The Kerosene Oil Company filed its petition to be declared a bankrupt and was adjudged a bankrupt (Exs. B and C, pages 138–147). The complainant was appointed assignee, and received assignments of the company's property (Exs. D and E, pages 147 and 148).

9. There is a large number of unsecured creditors of the Kerosene Oil Company (Ex. B, pages 138–147).

In addition to this, considerable evidence was given which complainant claims was not admissible, as it was introduced solely to vary the written instruments. This was substantially as follows:

1. Mr. Babcock testified that A. M. Cozzens came to him as an officer of the Guaranty Company, to make an application for a loan. Cozzens stated to him that his company (the Kerosene Oil Company) was turning out much oil and shipping largely abroad, and needed advances, which could not be obtained from banks, on its property; that the property of the company was worth $500,000; that he had control of the stock, except a small portion held by the Trustees; that the advances needed were $100,000, which was to be borrowed on

the property of the company, which, he stated, was unencumbered, and on which he would give the Guaranty Company a mortgage. He knew Cozzens was manager of the Kerosene Oil Company, and relied upon the representations he made. He thereupon introduced Cozzens to the officers of the Guaranty Company (pages 82, 83, 84).

2. Mr. Wallace testified that Cozzens was introduced to him and the President of the Guaranty Company (Mr. Wallace being then Vice-President) by Mr. Babcock. Cozzens then stated that he desired to borrow some money for the Kerosene Oil Company, to be secured by a mortgage on its real estate on Newtown Creek. Questions were asked, and Cozzens stated that he was President of the Kerosene Oil Company, that he owned nearly all the stock, that he had entire management of it, that he had a right to promise to execute a mortgage, that its property was worth $500,000, that he wanted $100,000 to be used in prosecution of the business of the Kerosene Oil Company. Cozzens, at request, sat down then and there and wrote a letter, dated February 15th, 1867, as follows :

NEW YORK GUARANTY AND INDEMNITY COMPANY,
Office, No. 14 Broad St.

February 15, 1867.

The NEW YORK GUARANTY AND I. COMPANY, J. J. HENRY, Esq., *President*.

Dear Sir, —It is understood that we will cause to be prepared a mortgage on the real estate of the company on Newtown Creek for the sum of $100,000 in your favor, and to be held by you for the loan of $50,000 made this day, and any future loan you may make to our company.

Your obedient servant,

A. M. COZZENS,
President of the N. Y. Kerosene Oil Co.

(Page 86.)

He then produced a note of the Kerosene Oil Company, endorsed Cozzens & Co. (page 87.) Cozzens desired the Guaranty Company to discount that note and said he would have the mortgage to secure that amount prepared as soon as possible. Cozzens stated that the Kerosene Oil Company owed

his firm over $100,000, and that note represented part of it. The mortgage was to be delivered as soon as it could be executed. The Guaranty Company relied on those statements, and would not have advanced except on the promise of the mortgage. The mortgage was to be on the Kerosene Company's property at Newtown Creek and was to secure $100,000, On that day (February 15th), the Guaranty Company advanced $50,000 upon the note, and the mortgage to be made. Nothing was said about the form of the papers. He was surprised when Cozzens' bond was presented. The papers were prepared by Cozzens' counsel. The mortgage was brought in March, and was then delivered to Mr. Butler, counsel for Guaranty Company. He knew that Mr. Butler was examining title, and that he required certain things to be done. The mortgage was originally acknowledged March 9th, 1867. The statement of the stockholders' consent was not in the mortgage then. Afterwards the date of mortgage and acknowledgment were changed, and that statement inserted. On May 11th, 1867, when bond and mortgage had been approved by counsel, the old account was settled; there was a little over $50,000 due; Cozzens paid the excess, and the $50,000 was renewed May 11th and endorsed on the bond. Neither the advance nor the renewal would have been made except for the mortgage. The new note taken on May 11th was note of the Kerosene Oil Company. The mortgage was the basis of the subsequent advances. The warehouse receipts for the third loan were delivered by A. M. Cozzens. He gave it in addition to the mortgage (pages 85-95). The contracts used by the Guaranty Company (Ex. G, &c, p. 169), were used with reference to the provisions of its charter, and to enable it to charge a commission (page 109).

3. Mr. Butler testified that he was counsel for the Guaranty Company, and had been since its formation, that he examined the title of the premises, that he first saw the bond and mortgage at office of Guaranty Company on March 9th, 1867, that the papers were then executed, and were delivered to him to examine the title, and to make the mortgage a valid security. He prepared the consent of the stockholders (Ex., page 175), and was furnished with Ex. A (p. 175). He mailed the consent to clerk of Queens

County, and on April 29th, 1867, received his certificate that it had been filed. He amended the mortgage by inserting a recital of the consent of the stockholders. He then altered the date of the mortgage, and had it re-acknowledegd. The question of the bond he considered, but concluded to leave it as it was, *i. e.*, Cozzens' bond. The matter was completed on May 11th, and he then advised the Guaranty Company to close up the loan (pages 104-105).

4. The bill of Mr. Butler for his services was produced (Ex. A., page 159), and the amount thereof was entered in the books of the Kerosene Oil Company as a charge against the company.

ASSIGNMENT OR STATEMENT OF THE ERRORS RELIED UPON.

The Circuit Court erred.

1. In reversing the decree of the District Court.

2. In decreeing that the mortgage mentioned and referred to in the bill of complaint was and is a valid and subsisting mortgage upon the real estate of the New York Kerosene Oil Company.

3. In decreeing that the mortgage was made, executed, acknowledged and delivered pursuant to and in conformity with the laws of the State of New York.

4. In decreeing that the mortgage was given to secure the payment of a debt contracted by the New York Kerosene Oil Company to the New York Guaranty and Indemnity Company, for moneys advanced and to be advanced to the Kerosene Oil Company by the Guaranty Company.

5. In decreeing that the sum of $100,000 or any sum was loaned or advanced by the New York Guaranty and Indemnity Company, to the New York Kerosene Oil Company, or that the same or any sum was so loaned or advanced on the faith and security of said mortgage.

6. In decreeing that the mortgage is a valid subsisting lien

upon said real estate, in favor of the New York Guaranty and Indemnity Company, and that that company was entitled to have the real estate sold, and to be paid the proceeds of such sale in preference to the other creditors of the bankrupt corporation.

7. In decreeing a sale of the said real estate, and the payment of the costs and debt of the New York Guaranty and Indemnity Company.

8. In decreeing that the New York Guaranty and Indemnity Company has and should have a prior and specific lien in preference to all other creditors of said bankrupt corporation, upon any and all rents received or derived by the assignee from said real estate, and that the assignee account therefor to that company if the proceeds of the sale of real estate were insufficient to pay the amount thereinbefore decreed to be paid.

9. In decreeing that the New York Guaranty and Indemnity Company recover against the complainant its costs and disbursements.

The appellant also claims and insists that the following evidence was inadmissible, and that the court erred in admitting and considering it.

1. The evidence of Samuel D. Babcock, of the conversation between himself and Abraham M. Cozzens, and the declarations of said Cozzens prior to the making of said mortgage (pages 82–85).

2. The evidence of James P. Wallace, of the conversation between himself and Abraham M. Cozzens, and the declarations of said Cozzens prior to the making of the said mortgage (pages 86–7).

Also to the paper on page 86, as follows :

NEW YORK GUARANTY AND INDEMNITY COMPANY,
Office, No. 14 Broad Street.

February 15, 1867.

THE NEW YORK GUARANTY AND INDEMNITY CO.
J. J. HENRY, Esq., *President.*

Dear Sir,—It is understood that we will cause to be prepared a mortgage on the real estate of the company on Newtown Creek, for the sum of $100,000, in your favor and to be held by you for the loan of $50,000, made this day, and any further loan you may make to our company.

Your obedient servant,

A. M. COZZENS,
President of the New York Kerosene Oil Company.

3. Also the evidence of James P. Wallace, on page 88, as to the loan being made, relying upon the statements of Cozzens, and the promise of the mortgage.

4. The evidence of William Allen Butler (pages 104–5).

And also claims that no extrinsic evidence was admissible to vary the bond and mortgage accepted by the New York Guaranty and Indemnity Company, and the court erred in receiving and considering it.

First Point.

THE MORTGAGE IS VOID ON ITS FACE.

The statute authorizing the formation of manufacturing companies, and under which the New York Kerosene Oil Company was organized and incorporated, originally prohibited them from mortgaging their real estate. It provided that they should, by their corporate name, be capable in law of purchasing, holding, and conveying any real estate whatever which might be necessary to enable them to carry on their opera-

tions, and then these words followed: " *But shall not mortgage the same or give any lien thereon.*"

Laws of New York, 1848, Chap. 40, p. 54.

In 1864 this statute was amended, and it is therein provided that any corporation formed under the Act of 1848 " may *secure the payment of any debt heretofore contracted, or which may be contracted by it in the business for which it was incorporated by mortgaging all* or any part of the real estate of such corporation;" and every mortgage so made shall be as valid, to all intents and purposes, as if executed by an individual owning such real estate: *provided* that the written assent of the stockholders owning at least two-thirds of the capital stock of such corporation shall be first filed in the office of the clerk of the county where the mortgaged property is situated.

Laws of 1864, Chap. 517, sec. 2.

I.—*The mortgage does not in terms secure, or purport to secure, any debt of the Kerosene Oil Company, but is given expressly to secure the payment of the money mentioned in the bond or obligation of Abraham M. Cozzens.*

1. The recital in the mortgage is, that Abraham M. Cozzens has made and delivered to the parties of the second part (the Guaranty and Indemnity Company), *his* certain bond or obligation in the penal sum of $100,000, which said bond declares that the same is given to secure advances to be made by the said parties of the second part to the said *Abraham M. Cozzens*, in all not to exceed $100,000. And for the better securing of the payment of the money mentioned in the condition of the said bond, the Kerosene Oil Company grants and conveys the premises.

Page 164.

2. The bond of Cozzens " is given to cover advances now " or hereafter to be made by the said The New York Guar- " anty and Indemnity Company to the said Abraham M. " Cozzens for the sum of one hundred thousand dollars, or " any less amount, upon the condition that whenever any sum " shall be advanced on this bond by the said The New York " Guaranty and Indemnity Company to the said Abraham

" M. Cozzens, the amount of such advance, and the date of the " same, shall be endorsed on this instrument, and signed by " the said Abraham M. Cozzens," &c.

Pages 166, 167.

3. The terms of this condition of the bond in respect to the endorsement thereon of the amount advanced were complied with. There are three endorsements—one for $50,000 and two for $25,000 each—and all are signed by Abraham M. Cozzens, individually, in which he declares that the advances were made to him, and that the amount is secured by the bond.

Page 167.

4. It is thus clear that the debt which the mortgage was given to secure was the debt created, or to be created, by Cozzens individually; and no covenant to pay the $100,000 by the Kerosene Oil Company can be implied in the mortgage.

The statutes of New York expressly provides that " no mort- " gage shall be construed as implying a covenant for the pay- " ment of the sum intended to be secured."

1 R. S., 738, § 139.

And further, " No covenant shall be implied in any convey- " ance of real estate, whether such conveyance contain spe- " cial covenants or not."

1 R. S., 738, § 140.

The proviso in the mortgage, that if the Kerosene Oil Company shall pay the money mentioned in said bond, then the mortgage and the estate granted shall cease and be void, does not imply a covenant to pay.

Salisbury *v.* Philips, 10 Johns., 57.
Criber *v.* Sisson, 3 N. Y., 264.

And the only *express* covenant to pay contained in the mortgage is a covenant on the part of Abraham M. Cozzens individually, which still further shows that the debt intended to be secured was the debt of Cozzens.

Page 165.

4. Some stress was laid on the argument in the court below upon the other recital in the mortgage that Abraham M. Cozzens, the President of the company, was, by a resolution of the Board of Trustees, authorized to borrow a sum not exceeding $100,000, and to execute a mortgage to secure the same, as indicating that the loan was for the company, and that Cozzens' bond was given as an additional security. To this there are two answers:

(1.) That the mortgage was not given to secure money borrowed by the company or Cozzens, but to secure advances to be made to Cozzens.

(2.) That no such resolution was ever passed by the Board of Trustees of the Kerosene Oil Company. A certified copy of the only resolution which was ever passed on this subject was furnished to the counsel for the Guaranty Company (page 104, Testimony of Butler; page 175, Exhibit A), and is as follows:

"On motion, it was resolved that the President be authorized "to execute a mortgage for the sum of one hundred thousand "dollars on the factory and works situate at Newtown Creek, "in Newtown, Queens County, and to affix the official seal of "said corporation thereto."

Abraham M. Cozzens is not named in the resolution, and neither he nor the President is authorized to borrow any money. The insertion of the name of Cozzens in the recital of the mortgage, and the statement that he was authorized by resolution to borrow money for the company was wholly unwarranted.

But this recital, if taken to be true, can have no such effect as is claimed for it. It is followed by a recital that Cozzens has given his bond for advances to be made to *him*, and the mortgage is given to secure the payment of the money mentioned in the condition of this bond. There is no declaration or intimation that the Kerosene Oil Company has borrowed or intends to borrow any money, or that payment of any money borrowed or to be borrowed by that company is secured by this mortgage.

II.—*The mortgage is given to secure future advances. It does not, and does not purport to secure an existing debt. Such a mortgage is not within the statute, and is void.*

1. By the statute, under which the Kerosene Oil Company was organized (Act of February 17th, 1848), the corporation was expressly prohibited from making a mortgage, so that it came into existence destitute of that power.

2. The only authority given to it afterwards to make a mortgage was by the Act of 1864. Any corporation formed under the Act of February 17th, 1848, was authorized to secure the payment of *any debt* which had been contracted prior to the passage of the Act of 1864, or which should be contracted in its business subsequent thereto, by mortgaging its real estate. The language of the statute is, "may secure the payment of any *debt* heretofore contracted, or which may be contracted by it, in the business for which it was incorporated, by mortgaging," &c.

3. It is an actual *debt* of the company, the payment of which can be secured. There must be an *indebtedness* of the company in existence at the time the mortgage is made; the mortgage cannot be given to secure future advances.

The statute uses the word "debt," and that word has a well, settled meaning.

"A debt is that which is due from one person to another; that which one person is bound to pay to another.

7 N. Y. Rep., 124, bottom of page.

"The legal acceptation of the word debt imports a sum of money arising upon a contract express or implied."

2 Hill's Rep., 223, bottom of page.

In *Weston* vs. *City of Syracuse*, 17 N. Y. Rep., 110, the city charter provided that the Common Council should be authorized to raise *once* in each year a certain sum to defray all the city's expenses, including all *debts* due from it, and it was a penal offence for an alderman to vote for the *payment* of any money not authorized by the charter. A contract on behalf of

the city was made after the council had raised the sum allowed for the year, and the contract was to be performed in the following year. Judge DENIO says: "The compensation to the contractor was not a *debt* until the service was performed and the contractor entitled to be paid. It was not a *debt* in the sense to which the correlative term *payment* could with propriety be applied."

Page 113.

Those are the terms used in the present statute. The company is authorized to give a mortgage to secure the *payment* of a *debt*.

It would seem, then, that future advances are not *debts*, and that the provisions of the Act of 1864 do not allow the company to mortgage its real estate to secure the payment of future advances.

In the court below the case of The Central G. M. Co. *vs.* Platt, 3 Daly's Rep., 263, was cited to show that the Kerosene Oil Company could make its mortgage to secure the *payment* of *future advances*. In regard to that decision it may be said:

(*a.*) That a decision of that question was not involved in the decision of the case. The question at issue was whether an injunction should be dissolved, and the court held that a court of equity had no power to enjoin a mortgagee of lands situate without the State from selling the mortgaged lands within the State according to the terms of the mortgage, upon the mere allegation that the power of sale is void.

Page 274.

Judge ROBINSON discusses in his opinion the question of the corporation's power to mortgage for future advances, but as his decision on that point was not necessary for the decision of the case, his opinion is simply *obiter*. In addition, it appears that the chief justice of his own court does not agree with him in his opinion on that subject.

Page 271.

(*b.*) That the class of corporations to which the Kerosene Oil Company belongs has been confused with other corporations, and laws, only which are applicable to certain other corporations have been applied to the Kerosene Oil Company.

It may be admitted that a corporation created without restrictions has the right to buy or sell or mortgage real estate, but the corporation in question was not created in that way. It came into existence *absolutely without any power to make a mortgage.* It was a peculiar kind of corporation, never having had one power which other kinds of corporations possess. In that it differed from such corporations as are referred to by the judge in his opinion.

When the Legislature gave this corporation a right to mortgage its property for a specific purpose, it did not broaden or increase any right inherent in the corporation, but gave it a new quality to the extent of the gift, and no further. It was like the case of the Legislature authorizing an alien who had no inherent right to hold real estate, to hold such for a specific purpose.

The application of the reasonings or decisions, which apply to corporations having inherent right to mortgage, to the Kerosene Oil Company is improperly made.

(*c.*) To allow stockholders to consent to a mortgage to secure the payments of future advances, would destroy the value of the safeguard put in the statute.

In such case the stockholders might pledge the whole future of the company, irrespective of who might thereafter be stockholders.

The stockholders in existence at any particular time could have no control over the question whether the company should or should not need certain advances, for they would find the real estate of the company already pledged for those advances.

(*d.*) Judge EARL, in Carpenter *vs.* Black Hawk G. M. Co., 65 N. Y. Rep., 43, has written an opinion on this question. At page 49 he says: "A mortgage upon real estate is allowed *only* to secure the *payment* of *debts.* It *cannot be made to raise money merely* to carry on the operations of the company." Although Judge EARL'S opinion is also *obiter*, it is, to say the least, of equal merit with that of Judge ROBINSON.

5. That the mortgage, if it secured anything, was a security for future advances, is apparent.

(*a.*) From the mortgage itself. That recites as a whereas that Cozzens has given his bond to secure *advances to be made*, and the mortgage is given to secure that bond.

Page 164.

(*b.*) From the accompanying bond, which expressly states that the bond is given to cover advances.

Deft's Ex. B, pages 166 and 167.

(*c.*) From the receipts endorsed on the bond. The one for $50,000 is dated May 11th, 1867; the first $25,000 is dated May 18th, 1867; the second $25,000 is dated June 22d, 1867.

Page 167.

The date of May 11th, 1867, as will be seen hereafter, is the date on which defendant elects to stand for the $50,000, and on which it *must* stand in order to claim that this sum is secured by the mortgage. The present date of the mortgage is April 29, 1867. But whatever may be taken as the date of the loan or advance of the $50,000, it is clear that the two sums of $25,000 each were future advances (see original check for those advances, page 107).

Second Point.

THE NEW YORK KEROSENE OIL COMPANY NEVER AUTHORIZED THE MAKING OF THIS MORTGAGE, AND IT IS NOT THE DEED OF THAT CORPORATION.

1. The only action of the Trustees which relates to the matter is the resolution recorded as adopted on the 9th day of March, 1867, and is as follows: "On motion, it was resolved "that the president be authorized to execute a mortgage for "the sum of one hundred thousand dollars on their factory "and works, situate at Newton Creek, Queens County, and to "affix the official seal of said corporation thereto."

Page 186.

This resolution merely authorizes the making of a mortgage for a certain sum. It did not authorize the making of a mortgage to secure advances to be made to Abraham M. Cozzens on his bond, or any future advances. If the resolution was sufficient to authorize the execution of a mortgage, it could only be for a mortgage to secure an existing debt of the company.

But this resolution neither specified the purpose for which the mortgage might be given, nor the party to whom it should be given, nor the debt it was to secure. If the Trustees could pass such a vote, they could give away all the property of the corporation. They, under the statute, could confer no such unlimited authority upon the president.

2. The resolution was not passed by a legal quorum of the Board of Trustees.

(*a.*) By the act under which the New York Kerosene Oil Company was organized, it was required to file a certificate, stating the number of its Trustees.

Act of Feb. 17, 1848, sec. 1.

It had the privilege of naming any number from three to nine, but the number it did name in its certificate became its number, unless legally changed.

(*b.*) The Kerosene Oil Company selected six as the number of its Trustees.

Complainant's Ex. A, pages 136 and 137.

No change is shown, and therefore six remained its number. By section 3 of Act of February 17th, 1848, the affairs of the company are to be managed by, and only by, its Trustees, and the Trustees must be stockholders.

(*c.*) The last annual meeting prior to March, 1867, was held August 4th, 1865 (page 185), and at that meeting Eli Kelly, A. M. Cozzens, F. H. Cozzens, James E. Kelly, C. Wheeler and G. W. Austen, six in all, were elected Trustees. Assume that they held over, as no others were elected, then in March, 1867, those gentlemen were the Trustees, or there were no Trustees.

Now, on March 8th, 1867, at a meeting at which were present only A. M. Cozzens, F. H. Cozzens and G. W. Austen, Mr. Eli Kelly's resignation was presented and accepted, and Mr. Thomas H. Cozzens was elected Trustee in his place.

Here a dilemma is presented. As the act under which the company was created does not prescribe the number necessary for a quorum, a majority of the six Trustees is necessary, *i. e.*, four for a quorum.

Ex parte Willcox *et al.*, 7 Cow., 402.

If it be admitted that the company could make less than a majority a quorum for the transaction of business, as attempted by resolution on page 177, yet that would only apply to the ordinary run of business; and besides, that resolution was undoubtedly changed, for we find that, at the meeting of May 10th, 1861, three was held not to be a quorum (page 179), and at every meeting thereafter until the one of March 8th, 1867, four were present.

If, then, four were necessary for a quorum, Mr. Kelly's resignation could not have been legally accepted; and if three made a quorum, and Mr. Kelly's resignation was legally accepted, then Mr. Thomas H. Cozzens was not legally elected, because he was not a stockholder.

Ev. of Cozzens, top of page 56.
Ev. of Fowler, pages 45 and 46.
Defendant's Answer, page 15.

(*d.*) When the meeting of March 9th, 1867, at which the only resolution (if any) which will support this mortgage was made, the company had only *five* Trustees, or else a quorum of the Trustees did not pass the resolution.

See meeting March 9th, 1867, bottom of page 185

If Kelly's resignation could be legally accepted by three Trustees, then, as Thos. H. Cozzens was not eligible, the company possessed only five Trustees.

If Kelly's resignation could not be accepted because three Trustees did not constitute a quorum, then it follows that three Trustees could not pass the resolution of March 9th, 1867, for in that event Thos. H. Cozzens could not have been elected.

(*e.*) As it is the *corporation* which must make the mortgage, and as it can make it only by a legally passed resolution, it is plain that any mortgage based on the resolution of March 9th, 1867, was not made or authorized by the *corporation*. The mortgage in question finds its basis in that resolution, or nowhere, and is void.

(*f.*) This case does not come within the decisions which have held that persons apparently entitled to act as officers will be considered as legal officers, although they may not have been properly elected or appointed.

An examination of those decisions will show that they relate

1st. To public officers of a State, County, City, etc.

In regard to such officers it is evident that individuals have no means of knowing whether they are or are not officers, and while the State, or County, or City, allows them to act, individuals should be permitted to treat them as *de jure* as well as *de facto* officers.

2d. To persons acting publicly as officers of private corporations to the knowledge of corporations.

The familiar illustration given is of a person acting in a bank as cashier of a bank, where, even if he were not legally appointed, he would have power to bind the bank as cashier.

3d. To persons having apparent authority to act, who do some act which concerns a third person, who had a previous right to the act, or had paid a valuable consideration for it.

An officer or agent of a corporation, who has acted legally, but whose term of office has expired, can, undoubtedly, bind the corporation (if it still lets him appear to act as an agent) with such persons as have dealt with him, or have paid to the corporation moneys or other consideration for the acts which the agent performs.

The principle, it will be found, is simply this : Where a third person, on account of any act of a corporation or body, public or private, has a right to presume that any particular individual is an agent of the corporation or body, then the law says that such third person can act on such presumption.

In other words, it is estoppel. And that is all that is meant by color of office. In King *vs.* Corporation of Bedford Level, 6

East., p. 356, at page 369 Lord Ellenborough shows clearly what color of office means. He says that an under-steward can act when the head-steward is dead *before his death is known* to the tenants. If the death were known to them, however, he would have no *color to act*. In other words, the tenants, having been authorized to treat the under-steward as an officer, are entitled to treat him as such so long as he appears to be such.

In the present case the facts withdraw the case entirely from such decisions. Here there is no pretence that Thomas H. Cozzens had ever acted publicly, or been held forth as a Director, or that the Guaranty Company had ever had occasion or right to rely on him as an officer of the Kerosene Company.

3. The corporation is not estopped to impeach the record.
Angell & Ames on Corp., § 513.

Nor does the secretary's certificate estop the corporation. This was called for by defendant's counsel, or voluntarily produced to satisfy him that there was a vote of the Trustees.

The defendant trusted to the secretary's *opinion* as to there being a quorum present at the meeting instead of going to the record itself, which was accessible.

It cannot be claimed that the secretary is the agent of the corporation to give an opinion on such a point. So far as a quorum is concerned he may have believed that Thos. H. Cozzens, though not a stockholder, could act as Trustee.

If the certificate of a secretary as to corporate action is conclusive, then any secretary may, at any time, ruin a corporation by certifying votes authorizing deeds or mortgages, and the corporation would be remediless.

The cases where corporations have been held estopped by papers issued by their officers have been cases in which it was made the duty of the officer to issue the paper. In this case there was no such duty.

4. The statute under which the Kerosene Oil Company was authorized to mortgage its real estate allows such mortgage to be made, provided the written assent of the *stockholders* owning at least two-thirds of the capital of such corporation shall

first be filed in the office of the clerk of the county where the the mortgaged property is situated.

That was not done in regard to the mortgage in question.

(*a.*) The mortgage was made, dated, acknowledged and delivered on March 9th, 1867.

Testimony of Wallace, p. 90.
Testimony of Butler, p. 104.

The date of the mortgage was afterwards changed to April 29th, 1867, and the date of the certificate of acknowledgment was changed to May 7th, 1869 (page 90). This was done under the direction of Mr. Butler, *counsel for the defendant* (page 104). The mortgage was not *re-executed*, but was reacknowledged.

(Page 104.)

Plainly, the only mortgage there was was a mortgage made and executed on the 9th day of March, 1867. An acknowledgment is no essential part of a mortgage in the State of New York. The mortgage certainly was not made at any period after March 9th, 1867.

That the delivery of the mortgage was in March, and at no other time, is shown by the testimony of Wallace (page 89), and the entry in the books of the Guaranty Company of the renewal of the loan of $50,000 on April 16, 1867, where the entry states that the collateral is note and *mortgage* (Ex. L, p. 173). That was before the reacknowledgment. After March 9th, so far as appears, the mortgage was never in the Kerosene Oil Company's agent's hands.

(*b.*) On the 9th day of March, 1867, no assent of any kind had been filed. The only one claimed to have been filed at any time was filed April 29th, 1867.

Deft's Ex., Feb. 5, page 175.
Test. of Butler, page 104.

(*c.*) The filing of such an assent before the making of the mortgage is essential to the validity of the mortgage (Act of May 2d, 1864, Sec. 2). Nor can any after filing of such assent

help the question. This is proved by the fact that the Legislature was compelled to pass an act for the purpose of allowing such subsequent filing (Act of 1875, chap. 88). That act does not apply to the present case, because the assent was not filed under it, nor its requirements complied with.

Third Point.

THE MEMORANDUM OR AGREEMENT TO GIVE A MORTGAGE SIGNED BY A. M. COZZENS, AS PRESIDENT OF THE NEW YORK KEROSENE OIL COMPANY, AND THE ORAL EVIDENCE OF THE INTENTION OF DEFENDANT, AND THE EVIDENCE OF CONVERSATIONS PRIOR TO THE MORTGAGE, WERE INCOMPETENT, AND SHOULD NOT BE CONSIDERED BY THE COURT IN DETERMINING THE VALIDITY OF THE MORTGAGE.

1. The admission of such oral evidence violates the plain rule that a written instrument cannot be varied or contradicted by parol.

(*a.*) On its face, the mortgage being given to secure a debt, the debt of Cozzens, it would be incompetent to show by such evidence (if the evidence tended to prove it) that it was intended to secure the debt of the corporation. This would vary and contradict the deed. All prior negotiations are deemed merged in the contract in writing when made.

(*b.*) There is an additional reason why a *mortgage* should not be thus varied or contradicted; because, being an assurance relating to the title to lands, it is subject to negotiation, and so notice to all the world that the transaction is exactly what the deed expresses, and great mischief would follow if it could be varied or contradicted.

And this statute cannot reasonably be construed as permitting or making valid a mortgage which on its face is given for a different purpose from that allowed by the act. If it admitted such construction, it would be a snare to all parties dealing on the faith of the record, as purchasers, incumbrances

and creditors. The record of this very mortgage, as a mortgage securing a debt of Cozzens', is notice to all such persons of its own invalidity. And as it is proved and conceded that there are subsequent debts to a large amount, the very mischief here suggested would happen if the mortgage could be contradicted.

2. The objectionable evidence which on these grounds should be excluded from the consideration of the court are—

First.—The letter or paper signed by Mr. Cozzens, as President of the New York Kerosene Oil Company (page 86), which is as follows:

"FEBRUARY 15, 1867.

THE NEW YORK GUARANTY & I. CO. J. J. HENRY, Esq.,
President.

Dear Sir,—It is understood that we will cause to be prepared a mortgage on the real estate of the company on Newtown Creek, for the sum of $100,000, in your favor, and to be held by you for the loan of $50,000, made this day, and any future loan you may make to our company.

Your obedient servant,

A. M. COZZENS,
President of the N. Y. Kerosene Oil Co."

At the date of this letter, A. M. Cozzens, as President, had no authority to bind the company by agreeing to give a mortgage. No resolution authorizing a mortgage was passed by the Board of Trustees until March 9, 1867 (pages 185-6), which was more than a month after the date of this letter.

Besides, a mortgage is of no validity unless the written assent of the stockholders owning at least two-thirds of the capital stock of the corporation is first filed in the office of the clerk of the county where the mortgaged property is situated. It is not pretended that any such written assent was signed until the 27th of April, 1867, and this was filed April 29th, 1867 (page 175).

It can hardly be claimed that the promise of a mortgage by A. M. Cozzens, as President, would be binding upon the com-

pany, where a mortgage, if executed by him at that time, would have been invalid and void.

Second.—The evidence of Mr. Babcock and Mr. Wallace, as to conversations between Mr. Cozzens and the officers of the defendant. (Testimony of Babcock, pages 82–85. Wallace, pages 85–9.)

Also the testimony of the same witnesses, that they believed and relied on Mr. Cozzens' statements (Babcock, p. 84. Wallace, p. 88); and to the question to Mr. Wallace, "Q. Upon what was that advance made?" and his answer thereto: "A. Upon the note of the Kerosene Oil Company and the mortgage to be made." (Page 88.)

Also to the testimony of Wallace, that they would not have made the advance except for the promise of the mortgage, and would not have renewed it on May 11th except for the presence of the mortgage and its approval (page 91); and to his testimony that the mortgage formed the basis of subsequent advances, and that they relied on it in making them (page 91).

Objection is further made to the testimony of Mr. Wallace, that nothing was said about Cozzens' bond, that it was a surprise to him that it accompanied the mortgage (page 88); also to his testimony as to the purpose for which the bond and mortgage were handed to defendant's counsel, and to the action of his counsel and approval by him (pages 89–90).

Mr. Butler's testimony as to his action and the advice given by him to the defendant is also objected to as wholly immaterial and irrelevant (pages 104–5).

Objection is also made to the testimony of Mr. Wallace on his redirect examination affirming his former testimony, and as to the checks being for advances and on the faith of the mortgage, and as to the purpose of taking the special agreement; also as to his belief and action on his belief; also as to whether it occurred to him that it made no difference in reference to the security of the mortgage, whether the checks were given to Cozzens or Cozzens & Co. (pages 108–110.)

In addition to the grounds of objection hereinbefore stated, it is insisted that Cozzens had no authority to make the statements and declarations testified to by the witnesses, Babcock and Wallace, and that oral evidence was not admissible to show the intention of the parties.

Fourth Point.

THE EVIDENCE, WHEN IT IS ALL TAKEN INTO CONSIDERATION, DOES NOT SHOW THAT THE MORTGAGE SECURES A DEBT OF THE NEW YORK KEROSENE OIL COMPANY. ON THE CONTRARY, IT SHOWS CONCLUSIVELY THAT IT SECURES A DEBT OF A. M. COZZENS.

1. The documentary evidence which has been heretofore referred to, is:

(*a.*) The bond of Abraham M. Cozzens for the full amount $100,000.

Pages 166 and 167.

(*b.*) The mortgage given by its terms to secure that bond.

Page 164.

(*c.*) The receipts given as the several loans were made, which are signed A. M. Cozzens, and recite a loan to him.

Page 167.

(*d.*) The checks given for the three loans, which made up the amount of the mortgage, which were payable to Cozzens & Co. and A. M. Cozzens.

Pages 106 and 107.

2. The only additional documentary evidence in the case bearing upon this point is:

(*a.*) The agreement to refund the advance of $50,000, signed by A. M. Cozzens.

Deft's Ex. G, page 169.

(*b.*) The agreement to refund the advance of $25,000, signed by A. M. Cozzens.

Deft's Ex. H, page 170.

(*c.*) The agreement to refund the second advance of $25,000, signed by A. M. Cozzens.

Deft's Ex. K, page 171.

(*d.*) The notes which are referred to in defendant's register as the collaterals (Deft's Exs. E and F, page 168), which are signed by A. M. Cozzens, President New York Kerossene Oil Company, and are to order of Cozzens & Co.

(*e.*) The transcripts from books of Cozzens & Co. (pages 151 to 158).

(*f.*) A note addressed to the Guaranty Company, dated February 15th, 1867, signed A. M. Cozzens, President of New York Kerosene Oil Company, in which it is stated that "we "will cause to be prepared a mortgage on the real estate of "the company on Newton Creek for the sum of $100,000 in "your favor, and to be held by you for the loan of $50,000 "made this day, and any future loan you may make to our "company."

Deft's Ex. I, page 150.

(*g.*) A bill for services of Barney, Butler & Parsons for examination of title for loan of Guaranty Company made out to the New York Kerosene Oil Company.

Deft's Ex. A, page 159.

(*h.*) The register of advances kept by the Guaranty Company, in which those loans appeared as made to Cozzens & Co. and A. M. Cozzens.

Pages 173 and 174.

(*i.*) The assent of A. M. Cozzens to the making of a mortgage for $100,000 to the Guaranty Company.

Page 175.

(*j.*) The minutes of the meetings of the Kerosene Oil Company.

Pages 176 to 188.

Particularly the meetings on page 185.

3. The oral evidence, which the defendant relies upon as showing that the loans were made to the Kerosene Oil Company, even as against the documentary evidence, is substantially as follows:

4. Mr. Babcock and Mr. Wallace both testify, that when Cozzens first came to them he stated that he desired to borrow some money for the Kerosene Oil Company (pages 83 and 86). This happened on the 15th of February, 1867. Thereupon the following matters happened:

(*a.*) At Mr. Wallace's request Mr. Cozzens sat down and wrote the note on page 86, which, it will be noticed, reads that the mortgage is to be held "*for the loan of* $50,000 *made this day*, and any *future loan you may make to our company*" (page 86).

(*b.*) Mr. Cozzens then produced the note for $50,000, signed by A. M. Cozzens, President of New York Kerosene Oil Company, to the order of A. M. Cozzens (page 87).

(*c.*) He desired the Guaranty Company to discount that note, and promised to bring the mortgage (page 87).

(*d.*) On that day the Guaranty Company advanced $50,000 (page 88) by check to Cozzens & Co. (page 106) the difference in amount, being commission (page 96).

(*e.*) At that interview Cozzens stated that the Kerosene Oil Company was indebted to him in over $100,000; that he owned nearly all its stock; that he was its president; that he had a right to promise to execute a mortgage; and that the business of the company was large, and it required a large amount of money (page 86).

(*f.*) On that day a similar paper to Ex. G, page 169, was given (page 95), prepared by the Guaranty Company (page 105).

(*g.*) The proceeding was entered in the register of the Guaranty Company, as shown on page 173 (page 108).

5. Everything that occurred on February 15th, 1867, which could characterize the $50,000 loan of that day has been stated, and it is clear that there is nothing in the evidence which can make the loan anything except a loan to Cozzens.

(*a.*) The witnesses Babcock and Wallace state that Cozzens stated that he desired to borrow for the company. He may have so stated; that is not material. The question is: *did he borrow for, and did they loan to the company.*

(*b.*) The letter upon which their counsel below placed reliance does not show that he then borrowed for, or that they then loaned to the Kerosene Oil Company. The letter is, that "he will cause to be prepared a mortgage on the real estate "of the company on Newtown Creek for the sum of $100,000 "in your favor to be held by you for the loan of $50,000 made "this day, and any future loan you make to our company" (page 86). That letter still leaves the question open as to whom the $50,000 loan was made. It does not state that it was made to the company, and if in fact it was made to Cozzens, the letter cannot pull the Guaranty Company through. Cozzens might have promised to give the company's mortgage to secure a loan to himself, but his promise could not give validity to the mortgage if the loan was not made to the company. The language ascribed to Cozzens by Wallace should be noted in this connection: "He had a perfect right to promise to ex-"ecute a mortgage" (page 86).

(*c.*) The note which Mr. Cozzens then produced, made by the Kerosene Oil Company, he desired the Guaranty Company to discount (page 87), but the Guaranty Company elected to *advance* on it instead of discounting it (page 88; Ex. L, page 173), and thereupon the Guaranty Company took back the customary agreement when *advancing on collaterals* (page 93; Ex. G, page 169). They charged a commission for taking care of the note on which the advances was made (page 96).

(*d.*) Cozzens may have made every one of the statements which it is claimed that he did make to Wallace and Babcock, and yet the loan have been made to Cozzens. The Kerosene Oil Company may have been indebted to him over $100,000; he may have owned nearly all its stock; he may have been its president; he may have had the right to promise a mortgage for its debts, and the company may have required a large amount of money in its business, and yet the loan have been made to Cozzens. Those facts do not in the least bear on the question as to whom the loan was made.

(*e.*) When, on the 15th day of February, 1867, the loan of $50,000, received its character as a loan, everything was *done* that could possibly be *done* to show that it was a loan to Cozzens and not to the Kerosene Oil Company.

(1.) The check was to order of Cozzens & Co. (page 106).

(2.) The note of the Kerosene Oil Company was *advanced* on, not *discounted* (page 88).

(3.) The loan was entered in the Guaranty Company's books as made to Cozzens & Co. (Ex. L, page 173), on the Kerosene Oil Company's note as collateral (same).

(4.) The Guaranty Company took the agreement of Cozzens, which stated that the loan had been made to *him* upon collateral belonging to *him* (Ex. G, page 169), which is a copy of the original (pages 93 and 106).

To oppose these acts there are :

(1.) The statements and promises of Cozzens.

(2.) The letter signed by Cozzens as president (page 86), in which there is no reference to any loan *having been* made to the Kerosene Oil Company, but a reference to a loan which every act characterized as a loan to Cozzens.

6. Nothing which occurred subsequent to February 15th, 1867, changed the character of that loan of $50,000 from a loan to Cozzens to a loan to the Kerosene Oil Company. What subsequently occurred in regard to that loan, is as follows :

(*a.*) The money was deposited in the bank account of Cozzens & Co. (page 127).

It is true that the Kerosene Oil Company had then no bank account, and that when Cozzens & Co. made any advances to the company the firm drew checks therefor on the firm's bank account (page 40) ; but there was nothing in that bank account, and nothing in the books of the *Kerosene Oil Company*, to show that the money received by Cozzens from the Guaranty Company was a loan or advance to or debt of the Kerosene Oil Company (page 32).

(*b.*) In March Mr. Cozzens brought to the Guaranty Company the bond and mortgage Ex. B, pages 166 and 167, and Ex. A, page 164.

The bond was the personal bond of Cozzens, and declares that it was to cover advances made and thereafter to be made to *him;* and the moatgage was to secure the money mentioned in the bond, and contained a covenant by Cozzens—*not by the Kerosene Oil Company*—to pay the loan (pages 164, 166 and 167).

(*c.*) On April 16th, 1867, the loan of $50,000 fell due (see note, page 87). Payment of it was not demanded then (page 106).

So far as the evidence shows, nothing was then done except to let the loan remain as it was. No payment of it was demanded (page 106), and no new note, apparently, was given as collateral. The bill book of Cozzens & Co. (Ex. No. 1, pages 160 and 161) shows no note in renewal of that loan till May 11th.

(*d.*) On May 11th, 1867, Mr. Butler had finished the examination of title, and advised the Guaranty Company to close up the loan and commence anew (page 105). The Guaranty Company made up an account showing their charges on the loan of $50,000 up to that date (page 97) for interest and *commissions.* Mr. Cozzens, as President of the Kerosene Oil Company, drew a new note in favor of Cozzens & Co. (thirteenth entry in account, page 160) as a renewal of the former one. Mr. Cozzens gave a check for the Guaranty Company's charges (pages 96 and 97); the President of the Guaranty Company wrote an endorsement on the bond that the company had advanced to Cozzens $50,000 (page 107), and Cozzens signed it (page 167); the Guaranty Company took a paper, similar to Exhibit G (page 169), signed by Cozzens, reciting an advance to him (page 95, cross-ex.), and the Guaranty Company entered in its register an advance to A. M. Cozzens on a note as collateral for $50,000 (page 173).

The Guaranty Company did not even pretend on May 11th, 1867, to make a new loan. It simply, by arrangement with Cozzens, continued the old loan on receiving from Cozzens a check for interest and for commission for taking care of the

collaterals. No payment of the original loan was demanded on April 16th, when it became due (page 106), nor was payment demaded or received on May 11th. Whatever the loan was on February 15th it remained on May 11th. It should be noted that none of those charges for commissions or interest were charged to the Kerosene Oil Company in its books.

(*e.*) On May 27th, 1867, Barney, Butler & Parsons sent their bill for services in, as shown at page 159, and it was paid, and was charged to the Kerosene Oil Company.

It is difficult to see how that can in any manner affect the character of the loan.

(*f.*) Thereafter the loan was from time to time renewed, as appears by Exhibit M (page 174), in every case being entered as an advance to A. M. Cozzens on a note of the Kerosene Oil Company as collateral.

(*g.*) Plainly, that loan of $50,000 never lost the character of a loan to Cozzens—which it received on February 15th, 1867—by anything that happened thereafter. In fact, all the subsequent matters show conclusively that the loan began as, and remained, a loan to Cozzens:

(1.) No payment of it was demanded when it fell due.

(2.) The bond given to the Guaranty Company was Cozzen's bond.

(3.) The mortgage showed an indebtedness of Cozzens.

(4.) Cozzens covenanted in the mortgage to pay the debt.

(5.) An officer of the Guaranty Company endorsed a receipt on the bond to the effect that the advance was to Cozzens.

(6.) The Guaranty Company prepared and had signed a statement similar to Exhibit G, showing the advance was to Cozzens.

(7.) The money went to the account of Cozzens & Co.

(8.) The renewal was made by the payment by Cozzens of interest and commissions, *none of which were charged against the Kerosene Oil Company* in its books.

7. As to the two advances of $25,000, made subsequently, it hardly seems necessary to go into such minute detail, as, confessedly, those loans do not stand on any stronger bottom than the loan of $50,000, in regard to the question whether they were loans to the Kerosene Oil Company or Cozzens. It would seem that they are quite clearly loans to Cozzens:

(*a.*) The first advance of $25,000 was made on May 18th, 1867 (page 91):

(1.) This was made by check to A. M. Cozzens (pages 106 and 107).

(2.) The register of the Guaranty Company shows an advance to A. M. Cozzens on deposit of a note (Ex. L, page 173).

(3.) A contract similar to Exhibit H (page 170) was given to the company showing an advance to Cozzens (page 95).

(4.) On the bond of Cozzens the Guaranty Company endorsed a receipt for Cozzens to sign to the effect that the advance of $25,000 had been made to him (page 107, and page 167).

(5.) The check went to the bank account of Cozzens & Co. (page 127).

(6.) From time to time that loan was renewed, and the register of the Guaranty Company shows at each renewal that an advance was made to A. M. Cozzens on a note of the Kerosene Oil Company as collateral (page 174, Ex. M).

(*b.*) The second advance of $25,000 was made on June 22d, 1867 (page 91).

The facts in regard to this loan are similar to the above, except that the Guaranty Company had a different security. (Ex. C, pages 167–168) for that loan (pages 91, 107, Ex. K; page 271, Exhibit M; page 174). The loan in this case was made on a warehouse receipt instead of a note (p. 91).

Fifth Point.

BUT THE ACTS OF THE NEW YORK GUARANTY AND INDEMNITY COMPANY CONCLUSIVELY SHOW THAT THAT COMPANY INTENDED TO LEND THE MONEY TO A. M. COZZENS, AND NOT TO THE NEW YORK KEROSENE OIL COMPANY. THE CLAIM NOW MADE THAT THE INTENT WAS TO MAKE THE LOAN TO THE KEROSENE OIL COMPANY IS NEGATIVED AND DISPROVED, AND THE GUARANTY COMPANY, HAVING DELIBERATELY PREPARED AND ACCEPTED THE MORTGAGE IN ITS PRESENT FORM, IS CONCLUDED FROM CLAIMING THAT IT IS A DIFFERENT SECURITY FROM WHAT IT PURPORTS ON ITS FACE TO BE.

1. When Cozzens first went to the Guaranty Company he asked them to discount a note executed by the President of the Kerosene Oil Company (page 87), but that is precisely what the Guaranty Company did not do.

2. The Guaranty Company were by law entitled to charge a commission for taking charge of articles which they took as collaterals to a loan (p. 109), and the evidence makes it perfectly plain that the intention of the company was to obtain that commission.

If the note of the Kerosene Oil Company had been merely discounted they could not have earned that commission.

As the collateral for taking charge of which they proposed to charge a commission, was the note of the Kerosene Oil Company, they could not very well make an advance to the Kerosene Oil Company on its own note made to the order of Cozzens & Co., and then charge the Kerosene Oil Company a commission for caring for the note.

To obtain that commission, then, the Guaranty Company was forced to make the loan to Cozzens & Co., or Cozzens, and take the note of the Kerosene Oil Company as collateral.

Having determined on that course, they did everything thereafter on the basis that the loan was *not* a loan to the Kerosene Oil Company. They took a contract of Cozzens & Co., or Cozzens, reciting a loan to the firm, or Cozzens, and containing a promise to pay. They entered it in their books as an advance to Cozzens & Co. on the collateral of the Kerosene Oil Company's note, and they drew the check to the order of Cozzens & Co., and delivered it to Cozzens.

3. Besides, the Guaranty Company thought that by the course adopted they would have better security.

1st. The security of the Kerosene Oil Company, as makers of the note pledged.

2d. The security of Cozzens & Co., as indorsers of that note.

3d. The security of Cozzens, as signer of the contract like Exhibit G, p. 169.

4th. The security of the mortgage on lands of the Kerosene Oil Company.

4. All the papers relating to the loans and advances were prepared by the Guaranty and Indemnity Company, or under their direction.

(*a.*) They prepared the paper like Exhibit G, reciting a loan to Cozzens.

(*b.*) They prepared the check payable to Cozzens & Co.

(*c.*) They prepared the endorsements of advances to Cozzens on the bond.

(*d.*) They examined the bond offered, and saw it was the personal bond of Cozzens, and considered the question of retaining it.

(*e.*) They examined the mortgage, and saw that it recited a debt of Cozzens, and that it contained no covenant to pay except by Cozzens.

(*f.*) They made the entries in their books showing loans to Cozzens & Co. and Cozzens.

5. The defendants received exactly what they intended to receive. They intended to receive the contract of Cozzens for a loan to him, with a note of the Kerosene Oil Company as

collateral; they intended to receive the bond of Cozzens; they intended to take just the form of mortgage they did take.

The defendants' mistake was *in supposing that the mortgage of the Kerosene Oil Company would be a valid security for the payment of the debt of Cozzens.* There was no failure to carry out the intentions of the parties. If there was a mistake, it was a mistake as to the legal effect of what they did.

The acts of the parties determine what their intentions were, not what they say they were.

6. The defendants, claim that in making all the loans they relied on the promise of the mortgage to be given, is untenable.

The answer to it is:

(1.) There was never any promise of a mortgage made by *the New York Kerosene Oil Company.*

(2.) If a promise of a mortgage was made by Cozzens, he had no authority on February 15th, when the promise was made, to make such a promise.

The President of such a company has no power to promise a mortgage, because by law the mortgage can only be made by order of the corporation at a meeting, and no such meeting had been held prior to February 15th.

If Cozzens had owned every share of the stock of the company except one for each of the other Trustees, he could not as owner have promised such a mortgage, because that could be made only by the corporation, and as on any theory three Trustees were necessary for a quorum, the two could have outvoted him.

(3.) The acts of the Guaranty Company do not show they relied on it.

On February 15th the company loaned $50,000 without the mortgage being in existence, without even a resolution authorizing it, without the necessary preliminary consent for the execution of it. They took, however, the contract of Cozzens to pay that loan and the note of the Kerosene Oil Company as collateral.

In the entries in their register, made at the time of the loans, we find clear proof that the Guaranty Company did not

rely on the mortgage. They specify as the collaterals the notes and the warehouse receipt, but only once, and that on April 16th (when nothing was done about the renewal, and when their counsel was still considering the mortgage) is the mortgage mentioned. Now, in their minds the mortgage looms up as their main reliance. Apparently, then they thought little of it.

7. The defendant lays great stress upon the letter of February 15th, 1867, found on page 86, as being a promise of a mortgage which a court of equity should compel the Kerosene Oil Company to carry out.

To this it may be suggested:

(1.) At the time it was made A. M. Cozzens, as President, had no authority to promise a mortgage on behalf of the Kerosene Oil Company.

On February 15th no resolution of the company was in existence authorizing a mortgage. No such resolution was made till March 9th, if at all.

As owner of stock, he could not promise it, for an *owner* has no such right. Besides, Mr. Cozzens did not own within 1,410 shares of all the stock (p. 46).

As *President* of such a corporation he could not promise, for it was beyond his powers as such.

(2.) It promises a mortgage "for the loan of $50,000, made this day."

If that loan was made to Cozzens, the promise (if he had power as President to make it) was a nullity, because the Kerosene Oil Company could not give a mortgage to secure Cozzens' debt. It has been shown that the loan was to Cozzens.

(3.) It promises a mortgage for "any future loan you may *make to our company.*"

Were there any future loans made to the company? is the very question at issue. The Guaranty Company could not have relied on that promise as a security for future loans they might make to Cozzens, and it has been shown that no other loans than two of $25,000 to Cozzens were made.

8. The defendant could not legally rely on the promise of a mortgage or upon what it claims as the interpretation of the letter of Feb. 15th.

The defendant was bound to know the law, and was bound therefore to know

(1.) That Cozzens could not, as *President*, either promise or make a mortgage from the Kerosene Oil Company.

(2.) That Cozzens, as *owner*, could not promise a mortgage of the Kerosene Oil Company.

(3.) That no authority had been given to any one to make or promise a mortgage prior to the resolution of March 9th.

(4.) That a mortgage of the Kerosene Oil Company could not be given to secure the bond or debt of Cozzens.

(5.) That the acts of the Guaranty Company amounted to loans to Cozzens & Co. or Cozzens.

All those things the Guaranty Company knew, or was bound to know, and knowing those things, it could not legally have relied upon the promise or the letter.

9. *There was no intent to have any further different or other security or mortgage than the one received.* The difficulty is that the Guaranty Company made a mistake as to the legal effect of its acts. If there had been an intent, as matter of fact, to have something different from that which the Guaranty Company received, the aid of the court might perhaps have been invoked, but, as matter of fact, the Guaranty Company received exactly what it intended to receive, and the mortgage was made exactly as it desired to have it made.

The cases cited by the defendant will be found to be cases where, by some mistake of fact, the *actual intent* of the parties has not been carried out.

In re Strand Music Hall Co., 3 De Gex J. & F., is of that nature. There the execution was defective, and the court held

the instrument should be held to be such an instrument as was intended.

In Monro *vs.* Port Henry Iron Co., 12 Barb., 27, 53, it was found as a fact that the corporation had adopted the name of Horace Gray & Co., and that acts done under that name instead of under its corporate name were therefore valid.

But when an instrument is given and received in execution of an agreement to give security, and it is ineffectual for that purpose, no relief can be given, though the court is satisfied that the instrument was so given and received under a misapprehension or ignorance of the law.

Hunt v. *Rousmanin's Administrators*, 3 Mason, 294 ; 1 Peters, 1.

Judge STORY, in commenting on this case, says: "It is manifest that the whole controversy in this case turned upon the "point whether a court of equity could grant relief where a "security becomes ineffectual, not by fraud or accident, or "because it was not what the parties intended it to be, but "because, conforming to that intention, the parties executing "it innocently mistook the law."

1 Story Eq., Sec's, 114, 115.
Leavitt v. *Palmer*, 3 N. Y., 19.

It appeared that Palmer, Mackillop, Dent & Co., bankers in London, had accepted bills and had become liable to pay a large sum of money for the North American Trust & Banking Company of New York. It was agreed that the bank should give to them its certificates of deposit for the amount of the bills, payable in twelve months, and renewable for six months longer, to be collaterally secured by an assignment to Trustees of certain specified securities belonging to the bank. In pursuance of this agreement the bank executed to Palmer, Mackillop, Dent & Co. notes, and to secure their payment assigned to the Trustees bonds and mortgages and stock.

The bank became insolvent, and a Receiver was appointed. He filed a bill to set aside the notes and assignment on the ground, among others, that they were illegal and void.

The court held that the notes, not being payable on demand, were issued in violation of the statute, and set aside the assignment.

Mr. Justice BRONSON, in delivering the opinion of the court, says:

"The ground on which the counsel for the defendants seemed mainly to rely was that the deed should be reformed so as to make it a security for the original liability of the bank. His printed point touching the question is as follows: 'The company having agreed with Palmer, Mackillop, Dent & Co., for a new and valuable consideration, to pledge to them the securities in question, and having actually assigned and delivered the securities, equity will reform any defects arising from accident or mistake in written instruments.' There are several difficulties standing in the way of this argument. So far as relates to the notes or certificates of deposit, it was of no practical importance, as we have already seen, which should be issued, for both alike would be void. As to reforming the deed, there is no bill or application for that purpose—not even an allegation in the answer that there was any mistake or accident in preparing the instrument, or that it does not express the real intention of the parties. If we could see that there had been a mistake in drawing the deed, it could not be reformed without filing a bill for that purpose, nor could we read and enforce the instrument as though it had been properly drawn. We should be obliged to follow the deed as it is. But what is, if possible, still more conclusive, there is not a particle of evidence to show that there was any mistake or accident in preparing the deed, or that it is not just what the parties intended it should be; and it could not have been reformed in equity if a bill had been filed for that purpose. It is true the parties intended to secure the original liability of the bank; but, so far as appears, they intended to do it in the very way it has been done, and that way is illegal. If they mistook the law, we cannot grant relief by making a new contract for them. This question was fully considered in the case of Hunt *v.* Rousmaniere (2 Mason, 342; 8 Wheaton, 174; 3 Mason, 294; 1 Peters, 1; and see Story's Eq., Sec's 114, 115), which underwent a great deal of discussion, and is directly in point."

Sixth Point.

CONSIDERABLE STRESS WAS LAID BY THE DEFENDANT IN THE ARGUMENT OF THIS CASE IN THE COURT BELOW, UPON THE RELATIONS EXISTING BETWEEN COZZENS AND THE KEROSENE OIL COMPANY, AND TO THE FACT THAT AT THE TIME THE MORTGAGE WAS GIVEN, THAT COMPANY WAS LARGELY INDEBTED TO COZZENS, AS UPHOLDING THE VALIDITY OF THE MORTGAGE. BUT IT IS INSISTED THAT NONE OF THESE CONSIDERATIONS MAKE, OR TEND TO MAKE, THE MORTGAGE A VALID SECURITY.

1. It was urged that Cozzens was the president and general manager of the company, and owned nearly all of its stock.

The fact was that he owned 3,590 shares of the 5,000 (page 46).

But if he had owned all the stock except the few shares required to make the persons who were Trustees qualified to become Trustees, he could still neither give nor promise a mortgage to secure his own debt. This the statute prevented. The mortgage was the mortgage of the corporation, and not of the stockholders, or a majority of them as stockholders.

2. It was also said that the Kerosene Oil Company was indebted to Cozzens in upwards of $100,000 – the amount of the mortgage.

And it was argued that if A (which must represent a corporation limited in its power to mortgage) owes B $100,000, and then B borrows $100,000 of C, and gives his bond for that amount to C, then A can give a mortgage to secure the bond of B. The fallacy of the reasoning is that A (the corporation) does not owe any debt to C, and the statute only allows it to give a mortgage to secure its own debt.

2. It was also urged, and the court below seems to hold, that the notes made by the Kerosene Oil Company were secured by this mortgage.

But the Guaranty Company were merely pledgees of these notes. They elected in order to obtain commissions to advance on those notes as collateral, and, so far as appears, they still remain in their hands as collateral security. The notes

represent, or are evidence, of an indebtedness of the Kerosene Oil Company to Cozzens, but are in the hands of the Guaranty Company as pledgees, with the right, undoubtedly, on their part to obtain the absolute title by foreclosure and sale of the pledgor,s interest. This was not done.

The question still recurs, to what loan were the notes collateral? To whom made? Who was the pledgor? The very term collateral, or pledge, implies that there was a debt contracted by some one for which the security was given. It is illogical to say that a mortgage which is a collateral security is given to secure another collateral security. It was given to secure the debt of somebody, and not another collateral security for that debt.

It is thus seen that to hold that the notes of the Kerosene Oil Company were secured by this mortgage, assumes the very question in issue between the parties. It still leaves unanswered the question whose debt was it.

But if this theory be adopted, there would be only $75,000 secured by the mortgage—two notes, one for $50,000 and the other for $25,000. For the other $25,000 advanced, no note of the Kerosene Oil Company was taken. This advance was made on oil. (See third receipt endorsed on bond, page 167; Defendant's Exhibit M., page 174; Defendant's Exhibit C., page 167; also Defendant's Exhibit K., page 171.)

And the fact that the Guaranty Co. made this advance to Cozzens, on oil, the same as it had advanced on notes before, shows conclusively that the purpose and object of the collateral was solely to enable the company to obtain commissions for the advances which it made to Cozzens, and which it could not have obtained if the advances had been made to the Kerosene Oil Company by a discount of the notes.

Again, if the notes or the mortgage had been transferred, without an assignment of Cozzens' bond, the transfer would have been a nullity. The *bond* is the principal, and the mortgage the mere incident.

Merritt v. *Bartholic*, 36 *N. Y.*, 44.
Batesville Institute v. *Kauffman*, 18 *Wallace*, 511.

3. It was also claimed that the evidence showed that the Kerosene Oil Company had received the benefit of the loans, had had the money advanced by the Guaranty Co., and therefore the mortgage should be held to be valid.

a. So far from this statement being true, almost exactly the reverse is shown by the evidence.

The check for the first loan was given Feb. 15th, and was on that day deposited in the account of Cozzens & Co.

The bank account of Cozzens & Co. stood as follows:

Cr.		1867.		*Dr.*	
Feb. 15,	Check Kirkland & Van	$15,000 00	Feb. 14.	Overdrawn	$20,873 06
" "	check Guaranty Co.	49,250 00	Feb. 15.	Drafts on acc. Kerosene Oil Co. acc. G. C. Gibbs	5,346 00
			" "	A. M. Cozzens	203 60
			" "	Checks to pay borrowed money	21,036 17
			" "	J. M. M. Fowler	25 00
			" "	G. W. Austin, Trustee	50 00
			" 16.	To Kirkland & Van	15,002 91

See pages 127 and 128 of the case.

The $50,000 went to pay over drafts and borrowed money of Cozzens & Co., except the sum of $5,346, which apparently went to account of Kerosene Oil Co.

The bank account at time of second loan, May 18th, shows:

Cr.		1867.		*Dr.*	
May 17.	Balance	$ 285 01	May 18.	Check to Cooper, H. & Co.	$10,015 38
" 18.	Check Guaranty Co.	24,639 58	" "	Shipment per *Pathfinder*	9 78
" "	Other deposits	14,183 98	" "	N. Y. Kerosene Oil Co.	2,931 35
			" "	Stone N. & S.	15,000 00
			" "	Aymar & Co.	10,013 61

See pages 127 and 128 of the case.

The bank account at time of third loan, June 22d, shows:

Cr.	1867.	*Dr.*
	June 21. Overdrawn.....	$739 70
June 22. Check Guaranty Co.	$25,000 00	" 22. Kerosene Oil Co..	95 00
" " " Kirkland & Van.....	2,500 00	" " A. M. Cozzens ...	100 00
		" " L. F. Mack..	800 16
		" " E. Cozzens & Co..	1,000 00
		" " Kerosene Oil Co..	1,640 00
		" " *Francis Skiddy*...	10,005 83
		" " Kerosene Oil Co..	3,000 00
		" " Aymar & Co.....	10,005 83
		" " A. M. Cozzens....	50 00

See pages 127 and 128 of the case.

It appears, then, that, on the days when the money for the three loans was deposited, the Kerosene Oil Co. apparently received:

Feb. 15th	$5,346 10
May 18th	2,931 85
June 22d	4,735 00
	$13,012 95

All the rest of the $100,000 was used for the purposes of Cozzens & Co. It is submitted that the Kerosene Oil Co. can, in no sense, be said to have profited by, or received the money.

b. But the fact is conclusively shown that Cozzens & Co. had the money and mingled it with their funds, and in drawing the checks, which they did in favor of the Kerosene Oil Co., were in no sense giving to the Kerosene Oil Co. any moneys loaned by the Guaranty Co. as such. The firm merely drew against its general account, in accordance with its custom.

4. The defendants *assumed* that the Kerosene Oil Co. had handed over its whole authority to Cozzens, and that he, therefore, had a right to promise or give a mortgage.

The difficulty here is, that there is no such proof, and that

the defendant did not act on any such theory. The defendant was bound to know that, merely as *President* of the Kerosene Oil Co., Cozzens could neither give nor promise a mortgage. It was quite beyond not only his powers, but beyond any powers which defendant could have supposed he possessed.

We are not presented with a case of an agent acting within the apparent scope of his authority, but with an agent who had no such authority, and who was known by the defendant (for they were bound to know the law) not to have such authority. The resolution authorizing a mortgage was not made till March 9th.

Seventh Point.

THE ONLY DECREE WHICH COULD HAVE BEEN GIVEN TO THE DEFENDANT BY THE CIRCUIT COURT WAS, THAT THE DECREE OF THE DISTRICT COURT BE REVERSED AND THE COMPLAINANT'S BILL BE DISMISSED.

1. A defendant cannot pray anything in his answer, except to be dismissed the court. If he wishes relief, he must file a cross-bill.

2 Barb. Ch. Pr., 480.
Story Eq. Pldgs., § 391, 391a.
German vs. *Machim*, 6 *Paige*, 288.
Ballance vs. *Underhill*, 13 *Scam.*, 453.
Tarleton vs. *Vieles*, 1 *Gilm.*, 470.

And the decision of the justice at the Circuit Court was, that the bill be dismissed (page 212), and the injunction being dissolved, the defendant could have proceeded with his foreclosure action in the State Court.

2. The Circuit Court had no power to decree a foreclosure of the mortgage and a sale of the mortgaged premises. Sitting as an appellate court, it certainly acquired no further or greater jusisdiction than the District Court had, or than was conferred on it by the bankrupt law as a court having concurrent jurisdiction with the District Court.

But no jurisdiction is given either to the District Court or the Circuit Court to entertain a bill to foreclose a mortgage filed by the mortgagee against the assignee in bankruptcy. The only question that could be litigated or determined would be as to the validity of the mortgage, and whether it was a lien on the property of the bankrupt, on bill filed for that purpose.

Eighth Point.

THE DECREE OF THE CIRCUIT COURT IS ERRONEOUS, IN THAT IT ADJUDGES AND DECREES THAT THE GUARANTY COMPANY IS ENTITLED TO ALL THE RENTS OF THE REAL ESTATE COLLECTED AND RECEIVED BY THE ASSIGNEE, AND THAT THE ASSIGNEE ACCOUNT FOR AND PAY THE SAME TO THAT COMPANY.

1. It is not founded upon any allegations, either in the bill or answer, or upon any proofs in the cause. The decree in all cases must conform to the allegations and the proofs.

Crocket v. *Lee*, 7 *Wheaton*, 522.
Hobson v. *McArthur*, 16 *Peters.*, 182.

In this case it is neither alleged nor proved that the Assignee has received any rents, or if he has, what diposition has been made of them. But the court, without any proof or inquiry, undertakes to apply them in payment of the mortgage debt, when, for aught that appears, they have been (if there were any) accounted for and disbursed in due course of administration in the District Court.

2. The mortgagee has no claim to or lien upon the rents. The mortgage is of the ordinary form of mortgage upon real estate, and it is well settled that in such cases, until foreclosure and sale, and, indeed, until a conveyance under the decree, the rents belong to, and are payable to, the owner of the equity of redemption of the mortgaged premises, and that the only way

that the mortgagee can acquire a lien upon them in equity is by the appointment of a Receiver.

Howell v. *Ripley*, 10 *Paige*, 43.
Giles v. *Comstock*, 4 *N. Y.*, 270.
Cheney v. *Woodruff*, 45 *N. Y.*
Mitchell v. *Bartlett*, 51 *N. Y.*, 447.

Ninth Point.

The decree appealed from should be reversed, and the decree of the District Court affirmed.

B. F. Tracy,
Of Counsel for Appellants.

OFFICE SUPREME COURT U.S.
FILED
APR 12 1880
D. W. MIDDLETON

SUPREME COURT OF THE UNITED STATES.

October Term, 1879. No. 264.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY OF THE NEW YORK KEROSENE OIL COMPANY,

Complainant and Appellant.

vs.

THE NEW YORK GUARANTY & INDEMNITY COMPANY,

Defendant and Appellee.

Brief for Appellee.

WILLIAM ALLEN BUTLER,
GEO. F. COMSTOCK,
Of Counsel.

Supreme Court of the United States.

CHARLES JONES, Assignee, &c., *Complainant and Appellant*,

vs.

THE N. Y. GUARANTEE AND INDEMNITY COMPANY,
Defendant and Appellee.

ADDITIONAL CASES CITED BY APPELLEE ON THE QUESTION OF ULTRA VIRES.

Aurora Agricultural Society vs. *Paddock*, 80 Ill., 263.

Bissell vs. *Mich. Southern & Indiana R.R. Co.*, 22 N.Y., 258.

Bissell vs. *City of Jeffersonville*, 22 How 287, page 299.

Zabriska vs. *Cleveland R. R. Co.*, 23 How 400.

Arnot vs. *Erie Railway Co.*, 67 N. Y., 315.

Railroad Company vs *Howard*, 7 Wall, 392.

Galveston R. R. Co. vs. *Cowdrey*, 11 Wall, 459.

Railway Co, vs. *McCarthy*, 6 Otto, 258, 267.

Supreme Court of the United States.

OCTOBER TERM, 1879.—No. 264.

CHARLES JONES, ASSIGNEE IN BANKRUPTCY OF THE NEW YORK KEROSENE OIL COMPANY,
Complainant and Appellant,

vs.

THE NEW YORK GUARANTY & INDEMNITY COMPANY,
Defendant and Appellee.

Brief for Appellee.

Statement of the Case.

The appeal in this cause is from a decree of the Circuit Court of the United States for the Eastern District of New York, entered June 23d, 1877, reversing a decree of the U. S. District Court in Bankruptcy made January 26th, 1875.

See Decrees, Record, pp. 194, 212, *fols.* 336, 387.

The complainant originally came into the U. S. District Court, in Bankruptcy, by petition and, after objections taken by defendant and argued before the U. S. Circuit Court, was allowed to proceed by bill in equity, to set aside a mortgage made by the New York Kerosene Oil Company, April 29th, 1867, upon its works and real estate at Newtown, Queens County, to the defendant, to secure the sum of $100,000 and interest. (*See order allowing bill to be substituted for petition, Rec., p.* 1, *fols.* 1, 2.)

Abstract of the Pleadings.

The complainant's bill alleged the adjudication of bankruptcy of the New York Kerosene Oil Company, June 16, 1868; the appointment of complainant as assignee in bankruptcy, September 8, 1868, and the assignment to him by the bankrupt corporation of its real and personal estate, &c.

That defendant claims an interest in the real estate of the bankrupt corporation by virtue of the above-mentioned mortgage, and has commenced an action in the Supreme Court of New York, against complainant and others, for the foreclosure of the mortgage and the sale of the mortgaged premises, &c.

The bill then alleges, on information and belief, that the said mortgage "is not, and never was, a valid and subsisting mortgage, or lien, on said real estate," and specifies the following grounds of invalidity:

First.—That it was not made in the form and manner, nor for the purpose, authorized by the laws of New York (*Rec., p.* 5, *fol.* 8).

Second.—That it was not made by or with the consent of the bankrupt corporation (*Ib.*).

Third.—That Abraham M. Cozzens, the president, and George W. Austen, the treasurer, had no authority to execute the mortgage in the name, or under the seal, of the bankrupt corporation (*Ib.*).

Fourth.—That it was not made to secure the payment of any debt contracted by said corporation in the business for which it was incorporated (*Ib.*).

Fifth.—That the written assent of stockholders own-

ing at least two-thirds of its capital stock was not given or filed, as required by law (*Ib.*).

Sixth.—That the mortgage was given to secure a debt of Abraham M. Cozzens, and that the New York Guaranty & Indemnity Company never loaned or advanced any money to the bankrupt corporation on the security of said mortgage, and no money advanced by it to Cozzens ever came to the possession of the bankrupt corporation (*Rec. p.* 5, *fol.* 9).

Seventh.—That the transaction was usurious, and the bond and mortgage void therefor (*Ib.*).

The bill further alleges that after the making and executing of the mortgage the bankrupt corporation contracted over $50,000 of debt in its business, provable in bankruptcy, on the faith of its real estate, &c. (*Ib.*)

The bill contains further allegations to the effect that the mortgaged premises are so situated that a sale under the decree of this court will be most beneficial to all parties, and complainant offers to have any sum which shall be found justly due and owing by the bankrupt corporation to defendant, and for which defendant holds any valid lien or mortgage on said real estate, adjudged to be paid out of the proceeds of sale (*Rec. p.* 6, *fol.* 10).

Prayer for injunction to restrain defendant's foreclosure proceeding in the State court, and for a decree of sale and determination of the rights of all parties, &c. (*Rec. p.* 6, *fol.* 11.)

The mortgage and accompanying bond are annexed to the bill as Exhibits A and B (*Record, pp.* 7–11).

The ANSWER of the N. Y. Guaranty & Indemnity Company, filed February 4th, 1870, denies specifically all the allegations of the bill charging any illegality or

invalidity in the mortgage, and avers that it was made, executed and delivered by the N. Y. Kerosene Oil Company, under authority of its Board of Trustees, to secure a debt contracted in the business for which it was incorporated, the written consent of stockholders, owning at least two-thirds of its capital stock, having been first duly filed, as required by law.

The answer also avers that the New York Kerosene Oil Company was incorporated under the general manufacturing law of New York, and that the mortgaged premises in question represented its capital.

That Abraham M. Cozzens was by vote and agreement of all the corporators and stockholders authorized to control and manage the affairs of the corporation.

That he became its president, and by his firm of Cozzens & Co. conducted all its business, received all its moneys and property, made purchases and sales, pledged its oil and other property as security for debts, with the full consent of the stockholders, keeping up the form of a corporate organization, but actually conducting the entire business, according to his own discretion, &c.; he being the owner of more than two-thirds, and nearly all, of the capital stock.

That, being such president, and having such control and authority, and such ownership of the capital stock, he applied to defendant, in the regular course of business, to make advances to the New York Kerosene Oil Company, representing that the company was indebted to his firm of Cozzens & Co. in upwards of $100,000, for money advanced to carry on its regular business, and that if defendant would make such advances, the repayment thereof should be secured by mortgage of the real estate of the company, in due form and according to law.

That on the faith of such security to be given, and of the security when given, the defendant made such ad-

vances, and the Board of Trustees of the New York Kerosene Oil Company authorized the making and execution of the mortgage in question, and the written consent of stockholders was given and filed pursuant to law.

That the mortgage and accompanying bond were prepared by the counsel of Cozzens, or of the Kerosene Oil Company, the bond being the bond of Cozzens, but that the mortgage was not delivered or received as security for a personal debt of said Cozzens, but solely as security for the loans and advances made to the company as the primary debtor.

That the mortgage constitutes the sole security for the advances, which amount to $100,000, besides interest, &c., and should be decreed to be valid and prior lien on the mortgaged premises, and defendant prays decree accordingly (*Answer, Rec., pp.*11-17,*fols.* 20-32).

Facts Established by the Evidence.

1. The New York Kerosene Oil Company (hereafter in this brief styled the "Kerosene Company") was organized under the general manufacturing law of New York, May 24, 1860. The nominal capital was $500,000, of which $25,000 only was paid in cash; the balance, $475,000, was represented by real estate and works at Newtown, Queens County, purchased at a receiver's sale of the property of a previously existing corporation known as the North American Kerosene Gas-light Company.

See Certif. of Incorporation, Ex. A., Record page 136, *fol.* 241.
Kelley, pp. 70, 71, *fols.* 125, 126.

2. Abraham M. Cozzens, since deceased, who previously to 1860 had been in the glassware business in the City of New York (*Thos M. Cozzens, p.* 58, *fol.* 104), was active in organizing the new corporation. He

associated his son, Thomas M. Cozzens, with him under the firm name of Cozzens & Co., as a commission house to manage the business (*Ib., fol.* 414). The son, who had been a clerk in his father's glassware store, and was then (1860) about twenty-two years of age (*fol.* 104), had only a nominal interest of *one-sixteenth* in the firm, and was connected with it solely to enable his father to manage the business of the Kerosene Company. The firm "was formed so that Cozzens & Co. could sell the oil and get a commission" (*Ib., fol.* 104).

Cozzens & Co. had their place of business at 89 Water street, and afterwards at 134 Pearl street (*fol.* 105), where the business of the Kerosene Company was conducted (*Ib.*). The works were at Hunter's Point, but such books as were kept were kept in the office of Cozzens & Co., and all the financial affairs were managed there. The bookkeeper of Cozzens was the nominal secretary of the company (*Fowler, p.* 23, *fots.* 41, 42). No officer of the company received a salary (*Res. July* 20, 1860, *Minutes, p.* 177, *fol.* 399). The treasurer was authorized at the first meeting of the Board of Trustees, to pay any bills which might be certified by A. M. Cozzens (*Res. July* 20, 1860, *Ib. fol.* 399), and there is no proof of any financial act being done except under his direction.

3. The Trustees named in the certificate of incorporation filed in 1860 were William H. Appleton Abraham M. Cozzens, Eli Kelly, Edward Cooper, Abram S. Hewitt and John A. Appleton (*Certif. of Incorp. Ex A., fol.* 305). They were re-elected at annual meetings of stockholders, July 20, 1861, July 21, 1862, July 21, 1863 (*Minutes pp.* 180, 181, 183, *fols.* 313, 314, 318). From 1860 to 1864, the business appears to have been conducted by Cozzens with some co-operation on the part of the other Trustees. In the last mentioned year A. M. Cozzens became the sole proprietor of the company. This was accomplished as follows :

On the 25th April, 1864, at a meeting of the Trustees, at which all were present (except Eli Kelly), a resolution was passed *nem. con.*, on motion of A. S. Hewitt, to sell the property, real and personal, of the corporation *at auction*, on the 15th June next (*Minutes, p.* 183, *fol.* 318).

No such sale was made. The resolution to sell was never rescinded, but after its passage the two Appletons, Hewitt and Cooper, disappear as Trustees, and from all participation in the affairs of the company. Cozzens, who, by his commissions, was getting all the benefit there was in the concern, bought out his associate stockholders and thus obtained absolute control of the company and of its property. This appears, by his own uncontradicted declaration, that he "owned all the stock except a very small proportion held by other parties who acted as Trustees of the corporation" (*Babcock, p.* 83, *fol.* 147), also by the whole course of the affairs of the company subsequent to April 25, 1864 (*Minutes*, 1864, *et seq., pp.* 183–186, *fols.* 318–321), and by the fact that at the first meeting of stockholders, after Cozzens' death, in March, 1868, Wm. H. Appleton, Cozzens' executor, who had long before sold his own stock, stated that all of the stock standing in Cooper and Hewitt's names really belonged to Cozzens' estate, being 4,876 shares out of 5,000 shares (*Minutes, March* 28, 1868, *p.* 186, *fols.* 321, 322).

That this acquisition of substantially the whole capital by Cozzens, and the simultaneous taking into his sole possession and control all the property and affairs of the Kerosene Company, followed immediately after the above resolution of April 25, 1864, is also plainly evident from the testimony.

Within ninety days thereafter, at the next annual meeting of stockholders, July 21, 1864 (*Minutes, p.* 183, *at foot*), no one of the two Appletons, Cooper or Hewitt appeared, but only Cozzens, Eli Kelly, his father-in-law (*fol.* 187), James E. Kelly, his brother-in-law (*p.* 69, *fol.* 122; *p.* 70, *fol.* 124), Frank H. Cozzens, his son, George W. Austen, his bookkeeper, who held *two shares*

of stock (*p.* 46, *at top*), and Charles L. Wheeler, an oil buyer for Cozzens (*fol.* 186), who held *five shares* (*p.* 46, *at top; p.* 26, *fol.* 47). These gentlemen elected themselves Trustees. This was simply to keep the corporate existence in being. Cozzens was really the sole party in interest. The new Trustees, who replaced the two Appletons, Cooper and Hewitt, were mere dummies. James E. Kelly, one of them, testified that he was made Trustee without his knowledge or consent (*p.* 69, *fol.* 122). He further testified, "I think Major Cozzens told me two or three years before his death * * that he had wanted to make a change *in his Trustees, and wanted somebody to 'fill up,'* and he transferred five shares of stock to me, and elected me Trustee; that is about the whole of it" (*Ib.*). He paid nothing for his stock (*p.* 69).

Cozzens was elected President on the same day, 21st July, 1864. No meeting of Trustees was held during the entire year ensuing July 21, 1864; no annual meeting of stockholders was held on the next regular day, July 21, 1865; but on August 4, 1865 (*Minutes, p.* 185, *fol.* 320), Cozzens & Co., father and son, and Austen, held a "stockholders' meeting," and these three re-elected themselves and the two Kellys and Wheeler Trustees.

No annual meeting of stockholders was held in 1866 nor in 1867; and no meeting of Trustees after August 4, 1865, was held in 1865, nor in 1866, nor in 1867, until March 8, 1867 (*Minutes, p.* 185, *fols.* 320, 321).

4.—From the first organization of the Kerosene Company, A. M. Cozzens had been the sole manager of its financial affairs (*resolution of Trustees at first meeting—Minutes, p.* 177, *fol.* 309), but prior to 1864 there had been a separate cash-book of the Kerosene Company kept at the office of Cozzens & Co., as well as a journal and ledger (*Marden, p.* 124, *fol.* 219), and a bank account in the Seventh Ward Bank. In July, 1864, all this was discontinued. The last entry in the cash-book of the Kerosene Company is July 22, 1864 (*Ib.*). Thereafter the cash account of the Kerosene Company was kept

wholly in the books of Cozzens & Co. (*Marden, p.* 126, *fol.* 222), and on July 20, 1864, the cash balance of the Kerosene Company in the Seventh Ward Bank, $443.33, was drawn out by a check in favor of Cozzens & Co., and deposited in the Metropolitan Bank to Cozzens & Co.'s credit in their own bank account (*Marden, p.* 125, *fol.* 221; *fols.* 880, 881).

5. From July 20, 1864, all receipts from sales of oil or other sources came into Cozzens' hands, and were mixed with the moneys of Cozzens & Co., and all payments for crude petroleum, labor and other expenses, were made by Cozzens & Co. from their private bank account in the Metropolitan Bank. The Kerosene Company from that time never had any bank account. Cozzens & Co. were the bankers of the company (*Fowler, p.* 40, *fol.* 71). They kept an account in their books called "Kerosene Oil Co.," in which they charged the Kerosene Company with all payments made and with the commissions of Cozzens & Co., and credited it with all receipts from sales of oil, &c. A statement was prepared on the first of every month showing the cash disbursements and cash receipts (*p.* 41, *fol.* 73), and the balance due to Cozzens & Co. for the excess of disbursements over receipts (*Ib.*). The books and accounts were all kept under A. M. Cozzens' direction by his bookkeeper, and the entries were made as he ordered (*Fowler, pp.* 53, 54, *fols.* 95–96).

6. The business of the Kerosene Company could not be conducted without borrowing money (*Ib., p.* 54, *fol.* 96).

In the earlier years of the organization a book of "Bills Payable" of the company had been kept by Cozzens & Co., as well as of "Bills Receivable." After December, 1863, the book of "Bills Payable" was discontinued, and after March, 1864, the book of "Bills Receivable" was also discontinued. Thereafter all bills, both payable and receivable, of the Kerosene Company, were entered in the books of "Bills Payable" and "Bills Receivable" respectively of Coz-

zens & Co., indiscriminately with their own (*Fowler, pp.* 37, 38, 39, *fols.* 66–68, 70).

Cozzens & Co. supplied the means necessary for the business of the company, negotiating the paper of the company signed by Cozzens as president, or the paper of the firm. This paper was discounted in the banks. The notes of the company when they matured were paid, like all other claims, out of Cozzens & Co.'s general funds (*Fowler, p.* 37, *fols.* 67, 71). Drafts on Cozzens & Co. for oil purchased in the oil regions for the company's works were paid in the same way. George C. Gibbs, superintendent of the Dennis Refining Oil Company, from which large quantities of oil came to the Kerosene Oil Works, drew his drafts for very large sums on Cozzens & Co., for such shipments (*Ib., p.* 44, *fols.* 78, 79).

7. The transactions of Cozzens in carrying on the business were on a large scale. Outside of the Kerosene Company business Cozzens & Co. did little or nothing. Their other business did not exceed *ten per cent.* of the whole (*Marden, p.* 124, *fol.* 220). Instead of closing up the Company, as contemplated by the resolution passed in the spring of 1864, Cozzens continued and greatly extended the operations.

The result was that the Kerosene Company became largely in debt to Cozzens & Co. On January 1, 1867, the company owed Cozzens & Co. a cash balance of $158,201.80 (*Fowler, p.* 41, *fol.* 73). The company had large maturing liabilities for purchases of oil. The works were in full operation, with large daily expenses. Gibbs was drawing heavily against shipments of oil. The debit balance on the 14th February, 1867, was $95,970.85 (*Marden, p.* 130, *fol.* 230), with large outstanding liabilities, and at the close of business on that day Cozzens & Co.'s bank account in the Metropolitan Bank was overdrawn to the amount of $20,873.96 (*Ib., p.* 126, *at foot*). A check had been drawn February 1, 1867, to pay a "call loan" of $15,000, made by Maitland, Phelps & Co., on February 12th, with two days' interest, and this large overdraft was the result (*Ib., p.* 127, *at top*).

8. In this emergency, on the 15th February, 1867, Cozzens, having full executive control of the company's affairs, and practically owning all the stock, determined to contract a debt on behalf of the Kerosene Company on the security of its real estate and works. For this purpose he applied to the New York Guaranty & Indemnity Company, hereafter in this brief styled the "Guaranty Company"), on behalf of t e Kerosene Company, for a mortgage loan of $100,000.

He went first to Mr. Samuel D. Babcock, who was chairman of the executive committee of the Guaranty Company, and who had known Cozzens for upwards of 20 years, and had also known, for several years, of his connection with the Kerosene Company (*Babcock, p.* 82, *fol.* 146), and whose office was then in the same building as that of the Guaranty Company. Cozzens supposed Mr. Babcock to have full power to make the advances he sought (*Ib., p.* 83, *fols.* 146, 147).

Cozzens stated to Mr. Babcock "that his company was turning out a large quantity of oil, shipping largely of their productions abroad, and required advances, which were not obtainable from the banks, upon their property; that they had a very valuable property in their works, and he named $500,000 as either the cost or probable value of the property; that he had control of the company, and owned all of the stock except a very small proportion held by parties who acted as Trustees of the corporation (*Babcock, p.* 83, *fol.* 147). He called the Kerosene Company "his company." He asked for an advance of $100,000 upon its property, stating that the company would make the mortgage on its property, which was unencumbered (*Ib.*)

Mr. Babcock, relying implicitly on the truth of Cozzens' representations (*Ib., p.* 84, *fol.* 148), introduced him to the president of the Guaranty Company, Mr. Joshua J. Henry (who died before this suit was commenced), and to the vice-president, Mr. J. P. Wallace, and he then made to them substantially the same representations (*Wallace, p.* 86, *fol.* 152). Cozzens told Mr. Wallace that he desired to borrow "money for

the Kerosene Company, to be secured by a mortgage on its real estate," that he was president of the company; that he owned nearly all the stock of the company, and had the entire management and a perfect right to promise to execute a mortgage (*Ib.*) "He said the business of the company was very large, and required a large amount of money" (*Ib.*) At the request of the officers he then wrote the following (*Wallace, p.* 86, *fol.* 152):

NEW YORK GUARANTY & INDEMNITY COMPANY—Office, No. 14 Broad St.

New York, Feb. 15, 1867.

The New York Guaranty & I. Co.,
J. J Henry, Esq., President:

Dear Sir,—It is understood that we will cause to be prepared a mortgage on the real estate of the company on Newtown creek, for the sum of $100,000, in your favor, and to be held by you for the loan of $50,000, made this day, and any future loan you may make to our company.

Your obedient servant,
A. M. Cozzens,
President of the N. Y. Kerosene Oil Co."

Cozzens then produced a note of the Kerosene Company, dated New York, February 15, 1867, for $50,000 payable sixty days after date, to the order of Cozzens & Co., and endorsed "Cozzens & Co.," and asked to have that note discounted, promising to have the mortgage prepared as soon as possible. He said that the Kerosene Company owed his firm over $100,000, and that this note represented a part of that debt (*Wallace, p.* 87, *fols.* 153, 154).

9. Relying on these representations (every word of which was true), the Guaranty Company thereupon advanced, on that day, $50,000 on the note and the promise of the mortgage, which was to be delivered as

soon as it could be prepared (*Ib., p.* 88, *fol.* 155). Nothing was said as to the form of the mortgage, nor as to any bond being given by Cozzens individually. Cozzens on the same day deposited the proceeds of this discount of the $50, 00 note, as he invariably did all receipts for account of the Kerosene Company, in Cozzens & Co.'s bank account. He had, apparently, as a temporary expedient, got a call loan of $15,000 from Kirkland and Von Sachs, and this sum he also deposited, but being in funds more permanently by the money obtained from the Guaranty Company, he repaid this call loan of $15,000 to Kirkland & Von Sachs on the next day, with interest (*Marden, p.* 127, *fols.* 224, 225).

10. Cozzens' next step, in strict pursuance of his arrangement, as President of the Kerosene Company, with the Guaranty Company, was to procure the requisite formal authority for the mortgage which, as president, he had agreed should be executed by that company to secure the advances already made to it, and those which were to be made.

For the first time since July 21, 1864, a meeting of Trustees was held, March 9, 1867, at which Ely Kelly resigned, and Thos. M. Cozzens was elected a Trustee (*Minutes, p.* 185, *fol.* 521), and on the next day a meeting was held, of which the following is the complete record on the minute book, in the handwriting of Geo. W. Austen, Secretary (*see p.* 61, *fol.* 109).

"New York, March 9. 1867.

At a meeting of the Trustees of the New York Kerosene Oil Company, held this day, at the office of the company, the following gentlemen were present, viz.: A. M. Cozzens, F. H. Cozzens, G. W. Austen, Thos. H. Cozzens.

On motion, it was resolved that the president be authorized to execute a mortgage for the sum of one hundred thousand dollars, on their factory and works situate

at Newtown creek, in Newtown, Queens County, and to affix the official seal of said corporaration thereto.

The meeting then adjourned.

G. W. Austen,
Sec'y."

(*See Minutes, p.* 185 *at foot.*)

11. On the same day the mortgage of the Kerosene Company, under its corporate seal to the Guaranty Company, was executed by Cozzens as president and Austen as secretary. They duly acknowledged the instrument before Thomas L. Ogden, a notary public in in New York City, and each of them testified on oath before him that the corporate seal was affixed by order of the Board of Trustees (*see mortgage, Exhibit "A," Rec., p.* 164, *fol.* 289, *and certificate annexed to mortgage, p.* 166. *fol.* 293.)

The first recital in the mortgage is as follows:

"Whereas, at a regular meeting of the Board of Trustees of the said The New York Kerosene Oil Company, held on the ninth day of March, one thousand eight hundred and sixty-seven, it was *Resolved*, That Abraham M. Cozzens, the president of said company, be authorized to borrow a sum not exceeding one hundred thousand dollars, and to secure the same, to execute a mortgage upon the factory and premises of the said company at Newtown, Queens County, Long Island, &c." (*see mortgage, Rec., p.* 164, *fol.* 289.)

The mortgage was prepared by Samuel E. Lyon, Esq., counsellor-at-law, at A. M. Cozzens' request. He prepared an individual bond of Cozzens' to accompany it, and the condition of the mortgage as expressed in it was that it should be void if the Kerosene Company paid the sum of money mentioned in the bond, &c., (*Ib. p.* 165, *fol.* 292.)

12. The giving of a personal bond of Cozzens' was no part of the arrangement with the Guaranty Company (*Wallace, p.* 88, *fol.* 156.) It was his own voluntary act. Nothing had ever been said about any bond. The bond was a matter of surprise to Mr. Wallace when Cozzens brought the papers to him (*Ib.*) The papers were referred to the counsel of the Guaranty Company, Mr. Butler, with instructions to examine the title (*Ib. p.* 89, *fol.* 157.)

13. The counsel of the Guaranty Company first heard of the transaction when the mortgage and accompanying bond were handed to him, fully executed, with $100 U. S. revenue stamps affixed (*Butler, p.* 104, *fol.* 183, *see p.* 164 *as to stamps.*) He required evidence of the action of the Board of Trustees of the Kerosene Company authorizing the mortgage, and also that a consent in writing, signed by stockholders owning two-thirds of the capital stock, as required by statute, should be given and filed. Mr. Lyon furnished the evidence of the authorization of the mortgage by the Board of Trustees by a copy of the minutes, certified by Austen, the secretary, under the seal of the company, and ackhowledged before a notary public (*Ib., and see p.* 175, *fol.* 305.) Mr. Lyon stated that in his opinion the written consent of stockholders was unnecessary, for the reason that A. M. Cozzens was the owner of all or nearly all the capital stock, and that the execution of the mortgage by him was a compliance with the statute (*Ib.*) But a literal compliance being required, a written consent of stockholders was prepared by the counsel of the Guaranty Company, as follows:

"We, the undersigned, stockholders in the amounts set opposite our names respectively in the New York Kerosene Oil Company, a manufacturing company formed under the act entitled 'An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,'

passed February 17th, 1848, and the several acts amendatory thereof, owning more than two-thirds of the capital stock of said corporation, do hereby assent to the mortgaging by said company of all its real estate situated in the County of Queens, to the New York Guaranty & Indemnity Company, in the sum of one hundred thousand dollars, with interest thereon, to secure the payment of debts contracted, or to be contracted in the business, for which said New York Kerosene Oil Company was incorporated.

Dated New York, April 27th, 1867."

The consent was sent to Mr. Lyon, who returned it signed as follows:

NAMES OF STOCKHOLDERS.	NUMBER OF SHARES.	AMOUNT.
Abraham M. Cozzens.....	*Four thousand nine hundred and thirty-eight shares..*	*$493,800*

This consent was also acknowledged by Cozzens before a notary public. (*See p.* 175, *fol.* 3.5,) and it was filed in the office of the clerk of the County of Queens, April 29, 1867, and a certificate of filing procured (*Butler*, p. 104, *fol.* 184). The Guaranty Company's counsel then amended the mortgage by inserting a recital of the giving of the consent by the stockholders. The mortgage was then re-dated April 29th, 1867, instead of March 9th, 1867, and re-acknowledged (*Ib.*), and the existing loan was closed so as to commence anew at a date subsequent to the re-acknowledgement of the mortgage.

The question whether it was necessary to have the bond of the Kerosene Company substituted for that of Cozzens was considered by the counsel of the Guaranty Company, and he decided that it was not necessary under the circumstances (*Ib., p.* 105, *fol.* 185). The charges for examining the title, recording the mortgage, &c., were made by Barney, Butler & Parsons, the attorneys of the Guaranty Company, to the Kerosene Company, and the bill was paid by Cozzens & Co. and charged to the Kerosene Company as a cash disbursement (*pp* 33, 46, 47, 159, *fol.* 283).

14. These steps having been taken, the Guaranty Company on May 11, 1867, advanced $50,000 on the mortgage. Subsequently it made a further advance of $25,000, evidenced by note of the Kerosene Company, and on June 22, 1867, a further advance of $25,000 was made, represented by a warehouse receipt of oil in possession of the Kerosene Company. All the advances, amounting in the aggregate to $100,000, were made on the faith and security of the mortgage (*Wallace, pp.* 90, 91, 92, *fols.* 160–163.

All the money advanced by the Guaranty Company went directly to the benefit of the Kerosene Company, being received by its bankers, Cozzens & Co., and applied immediately to payments for its account. The cash balance due Cozzens & Co. for their cash advances to the Kerosene Company was in excess of $100,000 every day from February 28, 1867, to June 30, 1867 (*Marden, p.* 128, *at top*).

The receipts for oil were valueless, the Guaranty Company never having any benefit from the oil (*Wallace, p.* 91, *fol.* 161).

15. In March, 1868, Cozzens & Co. and the Kerosene Company became openly insolvent. The company suspended payment March 28, 1868 (*Fowler, p.* 119 *at foot*). About a week afterwards A. M. Cozzens died. His death was caused by the faiture—"the physician said so" (*Ib., p.* 120 *at top*).

16. Cozzens left a will. His executor was Mr. William H. Appleton, one of the original stockholders and Trustees of the Kerosene Company, but who dropped out between April 21, 1864, and July 21, 1864, as stated above (*see page 7 of this brief*).

Cozzens had obtained from Mr. Appleton and other parties loans of money or credit, without security, which they claimed were due to them from the Kerosene Company. These debts appeared only on the books of Cozzens & Co., the bankers of the Kerosene Company, and had gone into Cozzens & Co.'s general bank account, precisely as the advances of the Guaranty Co. had done (*Fowler, p. 120 at foot, and see Ib., pp. 37, 38*).

The unsecured creditors, aided by the executor of Cozzens, set to work to destroy the mortgage of the Guaranty Company, the only creditor of the Kerosene Company which had taken the precaution to have its debt secured. The successive steps in the execution of this scheme were as follows:

June 11, 1868.—A meeting of the stockholders of the Kerosene Company was held (*Minutes, p. 188*). Present and voting, William H. Appleton, executor of A. M. Cozzens, deceased, representing shares actually standing in the name of his testator.....	3,500
And acting in respect to other shares, standing in other names, but "*really belonging to the estate of said Cozzens*" (*fol. 325*).....	1,286
Total.....	4,876
James E. Kelly, executor of Eli Kelly, deceased.....shares..	65
Francis H. Cozzens..... " ..	51
Charles L. Wheeler..... " ..	5
James E. Kelly ..... " ..	1

N. B.—Kelly figures here as holder of *one share*. He transferred the remaining four shares of the stock which Cozzens put in his name, and for which he

never paid (*p.* 69), to John Perkins, Ogden Haggerty, John H. Hall and F. H. Cozzens, each one share, to qualify them to act as Trustees to vote the company into bankruptcy (*see p.* 46). Add to the 4,876 shares, owned by Cozzens, the 50 of F. H. Cozzens, confessedly not his (*p.* 46 *at top*), Wheeler's 5, and Kelly's 5, really Cozzens, and Austen's 2 (*p.* 46), and the 4,938 shares signed for by Cozzens in the consent to the mortgage are accounted for (*p.* 63). (*See p.* 175, *fol.* 305.)

A Board of Trustees was then elected. Kelly was made president. He acted at Appleton's request (*p.* 72, *fol.* 128). If he signed any affidavit or report, as president, it was on the like request (*p.* 73, *fol.* 129). On June 11, 1868, Kelly's Board of Trustees authorized the filing of a petition in voluntary bankruptcy (*p.* 188, *fol.* 325).

17. June 16, 1868, the Kerosene Company, upon its own petition, was adjudicated a bankrupt, and the assignee in bankruptcy filed the bill in this cause, a proceeding wholly in the interest of the unsecured creditors.

Incidental Matters in Proof.

The complainant attempted to prove by the two sons of A. M. Cozzens, deceased, that no meeting of of the Kerosene Company took place on March 9th, 1867, and thus to falsify the minutes of that meeting, as shown on *pages* 185 *and* 186 *of the Record.*

This attempt wholly failed.

Thomas M. Cozzens, the "company" of Cozzens & Co., testified, on direct, that he never held any stock in the Kerosene Company (*p.* 56, *at top*); never did any act, so far as he knew, as Trustee (*Ib.*) He did not remember that he was ever informed of having

been made a Trustee (*Ib.*) He was then asked: Q. Have you any recollection whatever of attending any meeting of the Trustees of the New York Kerosene Oil Company in March, 1867, at which action was taken in regard to executing a mortgage upon the property of the company? A. *I don't remember; I may possibly have been there* (*Ib.*)

On further direct it appeared that, in the absence of Austen, and by the direction of his father, he made the entry in the books of the charges to the Kerosene Company of the bill of examining the title to the works for the mortgage (*p.* 57), and he says, at *p.* 58, *fol.* 103, that he "must have known at the time that it was a mortgage on the works."

On cross-examination he testified that he had a personal recollection that $50,000 was advanced by the New York Guaranty & Indemnity Co., which went into the general bank account of Cozzens & Co. in February, 1867, and that at that time, February and March, 1867, the payments of Cozzens & Co., on account of the New York Kerosene Co., were very large, and that those payment were made out of the general bank account of Cozzens & Co. (*pp.* 6) *and* 61, *fol.* 108).

On recross-examination (*fol.* 291) he was asked, in reference to the book of minutes of the Kerosene Co., to account for the statement of his presence at the meeting, and when asked if he was not present at that meeting, he said, *I may have been in the office; I was in the office every day.* "Q. Can you swear positively that you were not present and acting at that meeting? A. No, SIR." (*p.* 61, *at foot.*)

Francis H. Cozzens, the other son, was then called to the same point, and testified in reference to the meeting of Trustees, March 9, 1867: "I don't remember of any such meeting;" and further, that he was not at any meeting at which a mortgage on the company's works was authorized, and never heard of the mortgage until after the failure of the company (*p.* 62, *fols.* 110, 111).

On cross-examination he testified that he never had

a certificate of his stock in the Kerosene Company in his possession; did not know he was a stockholder until after the failure; may have known it, but did not remember whether he knew it or not, or where he got the information; had no recollection of ever doing any act as stockholder or Trustee; did not think he ever knew he was a Trustee; that in saying he was not present at the meeting of March 9, 1867, he spoke *from his general want of recollection of doing any act as Trustee* (*p*, 63, *fols.* 112, 113).

But it turned out that he had actually receipted for his certificate for fifty shares of stock, in the stock certificate book, July 19th, 1864, and his original signature was shown to and identified by him (*p.* 64, *at foot*). That he had as Trustee actually signed two annual reports of the company in 1865 and 1867 (*see Admission, p.* 68, *fol.* 120). He was asked:

Q. "Now, may you not, without remembering it, have signed the annual statement as Trustee and done many other acts? A. *Yes, I may have, but I forget about it*" (*p.* 65 *at top*).

He was shown his father's original affidavit, as certified by the notary public, that he was authorized by the Board of Trustees to execute the mortgage, and testified that he should assume *that statement to be true, even if it made his own recollection at fault* (*pp.* 66, 67, *fol.* 118).

A more signal failure of proof it would be difficult to imagine.

A question was made as to a portion of the debit balance of the account of Cozzens & Co.'s account with the Kerosene Company, which was made up of commissions, not on sales, but on consignments of products of the Kerosene Company's works, either oil, naphtha or gasoline, all products of petroleum (*p.* 108), to houses in foreign ports, the commission and guaranty commission of seven and one-half per cent. being charged by Cozzens & Co. on the invoice value

of each shipment at the end of the month, the same as on sales made by them in the home market.

(*Fowler, p* 110, *et seq.*)

On some of these shipments there was a loss, and on others a profit. The commission was charged only on the invoice value. The result of the consignment did not affect the commission. Fowler, the bookkeeper of Cozzens & Co., was asked to prepare a schedule of these several shipments, and in his examination (February 5th, 1873) he gave a detailed statement of each shipment and its result (*pp.* 110–118). It appeared that cash advances were procured on the security of the bills of lading, and that when the result of the shipment was ascertained, if there was a profit, it was credited in the books of Cozzens & Co., to the Kerosene Company, and if there was a loss, it was charged to the company (*p.* 118, *fol.* 209). Taking all the shipments, the entire net loss was $74,800.63, and the total commission charged by Cozzens & Co., 7½ per cent., was $5,610.04. If this commission and guaranty were an over charge and should be charged back to Cozzens & Co., it would simply reduce the debt of the Kerosene Company to Cozzens & Co. by $5,610.04, an immaterial difference (*p.* 119, *fol.* 216).

Complainant also attempted to show that the defendant had elected to put the transaction in a form destructive of the mortgage security.

This attempt also failed.

The Guaranty Company was authorized by its charter to make advances upon the pledge of property, real and personal, on such terms as might be established by its Board of Directors (*see Charter, Act April* 13, 1864, *Laws N. Y.*, 1864, *p.* 362). The company adopted a printed form of contract in making its advances, whatever the collateral

security might be. It was an universal rule to take contracts of this description (*Wallace, pp.* 108, 109, *fols.* 191, 192). In the transactions with Cozzens these forms were used (*see Deft's Exs. G, H, I, K, pp.* 169–172). They were signed by A. M. Cozzens, as the bond was, and recited that advances had been made by the Guaranty Company to him on the note of the Kerosene Company (*Ib.*), or on oil (*Ex. K*), and the several agreements fixed the rate of charges and commissions. The advances were made by checks to the order of Cozzens & Co., or A. M. Cozzens. The advance was registered at first in the name of Cozzens & Co., and afterwards in that of A. M. Cozzens, which Mr. Wallace explains (*p.* 133, *fols.* 235, 236): "At the time the mortgage was brought to us, with Mr. Butler's approval, and the first endorsement was made on the bond—that is May 11—after consultation with Mr. Henry, we decided to have Mr. Cozzens give us the name A. M. Cozzens on those agreements, for the reason that the bond had that name, and the bond was secured by the mortgage."

The learned District Judge ordered a decree to be entered adjudging the mortgage void.

Decree of U. S. District Court, p. 194, *fols.* 336–340.

On appeal to the Circuit Court, after hearing and advisement, the decree of the District Court was reversed, the mortgage adjudged valid, and the mortgaged premises ordered to be sold to satisfy the mortgage debt.

See Decree of U. S. Circuit Court, p. 212, *fols.* 387–404.

The complainant appealed to the Supreme Court of the United States.

Petition of Appeal, p. 215, *fols.* 405–417.

POINTS.

First Point.—The mortgage of the Kerosene Company to the Guaranty Company was properly upheld by the Circuit Court, as having been given under the authority of the New York statute, permitting a manufacturing corporation to mortgage its real estate and secure debts contracted in the business for which it was incorporated.

The mortgage shows upon its face that it was given in pursuance of the statutory authority.

The Statutes of New York applicable to the subject are the general Manufacturing Act, of February 17th, 1848, and the act amendatory thereof of May 2d, 1864.

The Act of 1848 provides as follows:

"§ 2. When the certificate shall have been filed as "aforesaid, the persons who shall have signed and "acknowledged the same, and their successors, shall "be a body politic and corporate, in fact and in name, "by the name stated in such certificate; and by that "name have succession, and shall be capable of suing "and being sued in any court of law or equity in this "State, and they and their successors may have a "common seal and may make and alter the same "at pleasure; and they shall, by their corporate "name, be capable in law of purchasing, hold- "ing and conveying any real and personal estate "whatever, which may be necessary to enable the "said company to carry on their operations named "in such certificate, but shall not mortgage the same "or give any lien thereon."

See Laws N. Y., 1848; *Chap.* 40, *p.* 54, *Sec.* 2.

By the amendatory act of May 2d, 1864, the Legislature of New York provided as follows:

"§ 2. Any corporation formed under the said act,

" passed February seventeenth, eighteen hundred and
" forty-eight, or of the acts amending or extending
" the said act, may secure the payment of any debt
" heretofore contracted, or which may be contracted,
" by it in the business for which it was incorporated,
" by mortgaging all or any part of the real estate of
" such corporation; and every mortgage so made,
" shall be as valid to all intents and purposes as if
" executed by an individual owning such real estate;
" provided that the written assent of the stockholders
" owning at least two-thirds of the capital stock of
" such corporation, shall first be filed in the office of
" the clerk of the county where the mortgaged prop-
" erty is situated."

See Laws N. Y., 1864, *Chap.* 517, *p.* 1154, § 2.

The mortgage was made under its corporate seal by the debtor corporation to the Guaranty Company, and recites as follows (*Record, p.* 164, *fol.* 289): "Whereas at a regular meeting of the Board of Trustees of the said the New York Kerosene Oil Company, held on the ninth day of March, one thousand eight hundred and sixty-seven, it was resolved that Abraham M. Cozzens, the president of said company, *be authorized to borrow a sum not exceeding one hundred thousand dollars, and to secure the same, to execute a mortgage upon the factory and premises of the said company,* at Newtown, Queens County, Long Island."

And further recites that "the *consent of the stockholders of said party of the first part,*" to the making of the mortgage to secure the bond given by Cozzens for advances to be made by the Guaranty Company not to exceed $100,000, has been "*first duly given and filed, pursuant to law, and recorded herewith,*" and then proceeds to grant the lands and premises of the corporation by a proper description with the usual mortgage condition, that if the *Kerosene Company, its successors and assigns, shall well and truly pay the said sum of money,* then the presents and the estate hereby granted shall be void, but if default shall be made, then the mortgagee company

shall be entitled to sell the said lands and premises, and convey the same, &c.

See the Mortgage, Rec., pp. 164, 166.

The acknowledgment of the mortgage under the oath of the president and secretary of the Kerosene Company attests that the corporate seal was affixed thereto by authority of the corporation.

See Certificate, Rec., p. 166.

Second Point.—The Act of 1864, above cited, as judicially construed, removed the disability imposed by the Act of 1848, as to the mortgaging by manufacturing companies of their real estate, and granted to them a power which, in the absence of the previously existing statutory restriction, they might have exercised under their common law powers.

In *Carpenter* v. *Black Hawk Gold Mining Co.*, (1875,) 65 N. Y., 43, the Court of Appeals of New York, say:

"This company was organized under the general act 'to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes.' (*Chap.* 40, *Laws* 1848.) The second section of that act provides that any company formed under that act shall be capable in law of purchasing, holding and conveying any real and personal estate whatever, which may be necessary to enable it to carry on its operations, but shall not mortgage the same or give a lien thereon.

"This latter clause is an abridgement of the powers which such corporations would otherwise have.

"Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money or their debts. (*Angel & Ames on Corp.*, 191; *De Ruyter* v. *St. Peter's Church*, 3 *N. Y.*, 238; *Barry* v. *Merchants' Exchange Co.*, 1 *Sandf. Ch.*, 280; *King* v. *Same*, 5 *N. Y.*, 547; *Richards* v. *Merrimack Railroad Co.*, 44 *N. H.*, 127.)

"This clause was modified by section 2 of chapter 517 of the Laws of 1864, which provides that any corporation formed under the Act of 1848, may secure the payment of any debt by mortgaging all or any part of the real estate, provided that the written assent of the stockholders, owning at least two thirds of the capital stock of such corporation, shall be first filed in the office of the clerk of county where the mortgaged property is situated."

See also Greenpoint Sugar Co. v. Within, 69 N. Y., 328.

Central Gold Mining Co. v. *Platt*, 3 Daly, 263.

Third Point.—The mortgage being executed by the New York Kerosene Oil Company, under its corporate seal, by its president and secretary, is presumptively the deed of the company, independently of any recital in the mortgage that it was made pursuant to an express direction of the Board of Trustees.

In the absence of all proof on the subject, it would be presumed that the instrument had been regularly made, and that it had been signed by the president and secretary, and the seal of the corporation affixed thereto by the express authority of the Trustees.

Jackson v. *Campbell*, 5 Wend., 572.

Angel & Ames on Corp., § 217.

Lovett v. *Steam Saw Mill Ass'n*, 6 Paige, 54.

Bank of Vergennes v. *Warren*, 7 Hill, 91.

"The mortgage had the corporate seal attached, and the presumption was that it was there rightfully."

Koehler v. *Black River Falls Co.*, 2 Black, 715, *p.* 717.

The requisite statutory proof that the seal had been

affixed to the mortgage by authority of the Board of Trustees, forms a part of the record of the mortgage, and the instrument itself contains a recital that such authority had been duly given. Independently, therefore, of any question of the records of the company, the mortgage is the corporate act of the company, and is binding upon it and its estate in bankruptcy.

Trustees of St. Mary's Ch. v. *Cagger*, 6 Barb., 576.

Medway Cotton Mfg. Co. v. *Adams*, 10 Mass., 360.

Melledge v. *Boston Iron Co.*, 5 Cush., 158. *See pp.* 161–171, 175–177, 179–181.

Moss v. *Averell*, 10 N. Y., 454.

Galveston R. R. Co. v. *Cowdrey*, 11 Wall., 459.

Fourth Point.—The mortgage was, in fact, executed by express authority of the Board of Trustees of the New York Kerosene Oil Company, duly given by resolution passed at the meeting of March 9, 1867, and the Circuit Court properly so found as a matter of fact.

See Resolution, Minutes, Rec., p. 185, *at foot and page* 13 *of this brief, ante.*

1st. The minutes of the meeting, as contained in the records of the company, are the best evidence of the fact that the resolution was passed. If the record were that of a public corporation, parol evidence to impeach or contradict it would be wholly inadmissible (*The People* v. *Zeyst*, 23 N. Y., 140).

The reason for the rule excluding parol evidence to contradict the record of a public corporation is

equally applicable to the record of a manufacturing corporation.

See Starkie on Evidence, Part IV., p. 997, *Vol.* 3, *Third Am. Ed.*
See also Taylor v. *Henry*, 2 *Pick.*, 397.
Buckley v. *Bentley*, 48 *Barb.*, 283.
Schultz v. *Halsey*, 3 *Sand.*, 405.

2d. The meeting was duly constituted; three members were a quorum (*Res., Minutes, fol.* 309). The resolution had the force of a by-law (*Ang. and Ames on Corp.*, § 328; *Union Bank of Maryland* v. *Ridgley*, 1 Harris & G., 324). The Board of Trustees could delegate its authority to a quorum composed of less than a majority of its members (*Hoyt* v. *Thompson's Exrs.*, 19 N. Y., 207, *and see pp.* 215, 216).

3d. The attempt to contradict the record of the meeting of March 9, 1867, was manifestly dishonest, and utterly failed. The fact of the meeting, and of the passage of the resolution, is established by competent proof.

See analysis of the evidence offered to contradict the record, on pages 19–21 *of this brief, ante.*

Fifth Point.—The requirement of the Act of 1864, in respect to the consent of stockholders, was also fully complied with. The written consent prescribed by the statute was first filed in the office of the clerk of the county where the mortgaged premises were situated.

See the consent, with proof of filing in the office of the Clerk of Queens County, Rec. p. 175, *fol.* 305; *also ante, p* 15.

The whole capital stock of the company was $500,-

000, divided into 5,000 shares of $100 each. A. M. Cozzens signed and acknowledged the consent, as owner of 4,938 shares, *i. e.*, the whole capital, with the exception of 62 shares; 3,590 shares stood in his name on the books of the company. This was over two-thirds of the capital (3,334 shares would be two-thirds). But that Cozzens really owned 4,938 shares is clearly shown by the evidence.

Standing in his name	3,590
In other names, but really belonging to him (*so claimed by his executor and admitted by the company, see Minutes, Rec. p.* 188, *fols.* 324, 325)	1,286
In name of Francis H. Cozzens (before Cozzens' death), 50; James E. Kelly, 5; George W. Austen, 2; and C. L. Wheeler, 5 (*Rec., p.* 66, *at top*); all transferred by Cozzens to make them Trustees	62
	4,938

Sixth Point.—The mortgage was given to secure a debt contracted by the New York Kerosene Oil Company, in the business for which it was incorporated. This was fully established by the evidence.

1st. The business for which the Kerosene Company was incorporated was "the manufacturing of oil, gas, or other burning or lubricating fluids or materials from coal, asphaltum, asphalt, rock, petroleum, or other substances, and the sale of the products of such manufacture."

See Certif. of Incorporation, Rec, p. 136, *fol.* 241.

2d. By the mode of doing this business which the company adopted, the entire cost of the manufacture was defrayed by Cozzens & Co., and all the sales were made by them as commission merchants, under an arrangement made at the time of the first organization of the company, and continued thereafter without interruption. The excess of cost of manufacture over net receipts of sale involved the company in a debt to Cozzens & Co. of over $100,000, and to provide for this debt the mortgage was authorized by the Board of Trustees and executed by the company.

See the Statement of Facts, ante. pages 9, 10.

3d. The fact that the debt was due in the first instance by the Kerosene Company to Cozzens & Co. does not make the mortgage to the Guaranty Company any less a security for a debt contracted by the Kerosene Company in the business for which it was incorporated.

Cozzens & Co. were, by the course of business adopted by the Kerosene Company, the bankers of that company.

Fowler, Rec. p. 40, *fol.* 71.

The company's overdraft of $100,000 and upwards for the requirements of its business due Cozzens & Co. was repaid by the advances of the Guaranty Company, made directly to the company's bankers, on the mortgage security.

There was thus no other consideration or debt represented by the mortgage than that of the existing indebtedness of the Kerosene Company in its regular business.

4th. The averment of the complainant's bill that the mortgage was given to secure a debt of Abraham M. Cozzens is not only wholly unsupported by any proof, but is disproved by the books and accounts

of the Kerosene Company and by complainant's own evidence.

See testimony of Fowler, and abstracts and statements showing monthly debit balances against Kerosene Company (Rec., pp. 151–158).

NOTE.—*Mistake on page 158 of Record: the year in first line of page should be* 1873, *and in the second line* 1867.

5th. The absence of any express covenant in the mortgage to pay the debt is immaterial. The mortgage bound the land, and the money having been advanced as a loan to the Kerosene Company, the land was the primary security for the debt.

Seventh Point.—The money advanced by the N. Y. Guaranty Company upon the security of the mortgage came into the possession of the N. Y. Kerosene Oil Company, and that company had the full benefit of every dollar of the advances.

The evidence showed that the checks of the N. Y. Guaranty Company, constituting the several advances, were deposited directly in the general bank account of Cozzens & Co., the same as proceeds of sale of oil, and were used at once in payment of drafts drawn for shipments of oil and other obligations for account of the Kerosene Company.

The $100,000 was advanced by the Guaranty Company as follows:

February 15, 1867	$50,000
May 18, 1867	25,000
June 22, 1867	25,000
Total	$100,000

The several amounts appear in the bills payable of Cozzens & Co., in which drafts and notes made by Cozzens, president, and by Cozzens & Co., were entered indiscriminately (*p.* 39, *fols.* 69–70). They also appeared in Cozzens & Co.'s cash book. Fowler testifies as follows: "Q. The proceeds of these several advances of the Guaranty Company went into the general bank account of Cozzens & Co.? A. Yes, sir. Q. And out of that general bank account Cozzens & Co. made the advances to the Kerosene Company? A. Yes, sir; in the way of paying their bills; it came out of Cozzens & Co.'s bank account. Q. So that Cozzens & Co. were, in fact, the bankers of the Kerosene Company? A. Yes, sir. * * * Q. As I understand your evidence and the accounts and books produced here, there were no creditors of the Kerosene Company in 1867 for cash loaned or advanced except Cozzens & Co.? A. None that I know of" (*see p.* 40).

The interest and discount on the several advances were not charged to the Kerosene Company, but the same is true in respect to all discounts of paper obtained by Cozzens & Co., all of which went into their general bank account. So that the whole advances of the Guaranty Company were at once available and availed of to meet the pressing necessities of the Kerosene Company.

Eighth Point.—The written agreement of Cozzens as president of the Kerosene Company, made February 15, 1867, to give the mortgage upon its real estate as security for the advance for which he applied, on its behalf, to the Guaranty Company, was an agreement which he was competent, as president, to make. By reason of his ownership of more than two-thirds of the capital stock, and his absolute control of the affairs of the company, he had full power to execute it. The promissory note of the Kerosene Company, in favor of

his firm of Cozzens & Co., represented an actual debt contracted in the business for which the Kerosene Company was incorporated, and was a valid obligation. The evidence is undisputed that the Guaranty Company made the first advance of $50,000, at the same interview at which it was solicited. Also that it was made on the faith of the security of the real estate of the Kerosene Company, and upon the written promise of Cozzens, as president, that such security should be given. The relation of borrower and lender was thereby, then and there, established between the Kerosene Company and the Guaranty Company, Cozzens, as president and proprietor, acting throughout in behalf of the Kerosene Company.

See the testimony, wholly uncontradicted, of Messrs. Babcock and Wallace, Rec., pp. 82, 83, 85–87.

The agreement to give the mortgage was valid, and will be treated in equity as a mortgage.

Burdick v. *Jackson*, 15 Nat. Bank Reg., 318, *and cases cited on p.* 320.

Ninth Point.—Cozzens having full authority to borrow money for the Kerosene Company, and to agree to give the mortgage security, it is wholly immaterial whether, when he delivered the note of the Kerosene Company to the Guaranty Company, on February 15, 1857, and received its money as "*a loan of* $50,000, *made this day to our company*," to be secured by "*a mortgage on the real estate of the company*," he also signed an agreement by which he bound himself to repay the advance.

This agreement was only a part of the transaction; the question is, what the parties really intended by the whole transaction. This is a question of fact, and "courts of equity will always look through the

forms of a transaction, and give effect to it, so as to carry out the substantial intent of the parties."

Horn v. *Ketaltas*, 46 *N. Y.*, 605; *per* ALLEN, J., *p.* 610.

1st. In determining the question of fact, the court is to place itself in the same situation as the parties who made the contract, in order that it may view the circumstances as those parties viewed them.

Nash v. *Towne*, 5 *Wall*, 689.

Cited by HUNT, *J., in his opinion, Rec., p.* 209, *but citation misprinted, see fol.* 372.

In *Brick* v. *Brick*, 98 U. S., *p.* 514, this court say, citing *Peugh* v. *Davis*, 96 U. S., 336: "A court of equity looks beyond the terms of the instrument to the real transaction. * * * The object of parties will be considered by a court of equity."

2. The court will treat an agreement for a mortgage or pledge of property as binding, and will give it effect according to the intention of the parties.

White Water Valley Canal Co. v. *Vallette*, 21 How., 414, *and cases cited on p.* 422.

3. It is an established doctrine of equity that instruments, absolute on their face, may be shown by extrinsic evidence to have been intended as security only, and that in any transaction in which different instruments are executed or delivered, the question for a court of equity is one of the actual intention of the contracting parties.

Horn v. *Keteltas*, 46 *N. Y., and cases on pp.* 609, 610.

Hughes v. *Edwards*, 9 Wheat, 489.

Greenpoint Sugar Co. v. *Within*, 69 N. Y., 328, *p.* 336.

Tenth Point.—There can be no question in this case as to the real intention of the parties.

The uncontradicted evidence establishes the fact that the signing of the agreement, on February 15, 1867, by Cozzens, in the name of his firm, was a mere incident, in conformity with the routine of business of the Guaranty Company, and was not intended to make him or his firm the primary debtor (*testimony of Wallace, p.* 109).

The advance was applied for on behalf of the Kerosene Company, and on the security of its property, and was so made. The agreement signed by Cozzens & Co., though absolute in its terms, was, in reality, only collateral. The evidence was admissible to show this fact, and it is wholly uncontroverted.

Chester v. *Bank of Kingston*, 16 *N. Y.*, 336, *and see cases cited by* PAIGE, *J., p.* 343.

The view taken by the learned District Court that, although the original intention of the parties was to lend the money to the Kerosene Company on the security of its real estate, this was "deliberately abandoned," &c., and the substance of the transaction changed, is wholly untenable, and was properly overruled by the Circuit Court. The agreement to lend, the security for the loan, and the advance of one-half of the sum applied for, on the faith of that security, were all at a single interview, and it is not pretended that any change was ever made, unless it was made at that interview, because the same form of agreement was then taken which was afterwards taken. Similar contracts were signed by Cozzens & Co. or Cozzens on every advance and renewal.

Eleventh Point.—It is wholly immaterial that Cozzens gave his own bond accompanying the mortgage.

An agent may contract in his own name and yet bind his principal, if the principal is disclosed, and if the transaction is really for the benefit of the principal and is authorized by him. This is familiar law. Its application in this case is the more direct and pertinent because the fact is established that Cozzens was in reality the proprietor of the Kerosene Company, and thus, whether he contracted in his own name or in the corporate name, was acting with full authority to bind the corporation, the principal debtor.

1st. The sole requirements of the statute are that the mortgage shall be given for a debt of the company, and that the written consent of the stockholders owning two-thirds of the stock shall be first filed. If these conditions are met, it is wholly immaterial that the obligation of the individual who was president at the time was also given.

See Conro v. *Port Henry Iron Co.*, 12 Barb., 27. In this case the defendant corporation was held liable for a debt created by acceptances on which the name of the corporation did not appear. The court say, per WILLARD, *J.*: "Nor would the liability of the company be varied, although it should appear that its agents, acting within the scope of their authority, contracted in their own name without disclosing that of their principal. * * It has already been seen that Horace Gray *was the owner of about six-sevenths of the stock of the Port Henry Iron Company at the times the debts were contracted, and that he controlled all its operations from the beginning, and was its president*" (pp. 55, 56).

See also Milledge v. *The Boston Iron Co.*, 5 Cush., 158, *cited in Conro* v. *Port Henry Iron Co.*, 12 Barb., *pp.* 55, 56.

Eureka Co. v. *Bailey*, 11 Wall., 488.

Bk. of Genessee v. *The Patchin Bank*, 13 N. Y., 309, see p. 317.

2d. Again, there is no conflict of evidence in reference to the circumstances under which the individual bond of Cozzens came to accompany the mortgage. The testimony of Mr. Wallace, president of the Guaranty Company, that it was no part of the arrangement that Cozzens' bond should be given, and that it was prepared by counsel of Cozzens' selection, and also that all the advances were made on the faith of the *mortgage security*, stands uncontradicted. The real transaction being that the advances were on the faith of the mortgage, and the mortgage having been duly authorized by the corporation, the additional element of the individual bond of Cozzens, introduced on his own motion, does not affect the case.

2d. Even were the fact less plain, equity will always give effect to the real intention of the parties, where it can be discovered, though the writings may seem at variance with it.

The remarks of Ch. J. MARSHALL, in *Shirras* v. *Caig*, 7 Cr., 34, p. 50, are in point. "If, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights. * * * *There is less reason for imputing blame to the mortgagees in this case, because the deed was prepared by the mortgagor himself.*"

Twelfth Point. — The Kerosene Company having handed over to A. M. Cozzens the substance of all the authority of its Board of Trustees, and the control of all the property of the corporation, is bound by his acts and representations so long as he acted within the scope of his apparent authority and dealt with parties having no notice of the real facts.

There is no pretense that the Guaranty Company had any notice or suspicion of any fact which can impair or affect the validity of the mortgage or the mortgage debt.

It is well settled that where the whole property and control of a corporation has been surrendered to an officer or agent, the corporation is estopped from denying the validity of his acts or representations as against innocent parties.

Beers v. *Phœnix Glass Co.*, 14 Barb., 358.

New York & New Haven R. R. Co. v. *Schuyler*, 34 N. Y., 30. *See per* DAVIS, *J.*, p. 58.

Ranger v. *Gt. Western R. R. Co.*, 5 H. of Lords Cases, 86.

Thayer v. *Barlow*, 19 Pick., 511.

Merchants' Bk. v. *State B.*, 10 Wall., 604.

In the last cited case the court say (*p.* 645), per SWAYNE, *J.*: "Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics and the law of the case alike require this result (*Dezell* vs. *Odell*, 3 Hill, 216). Those who created the trust appointed the Trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party."

Thirteenth Point.—The pretence that any one dealt with the Kerosene Company on the faith of its real estate, after the execution of the mortgage (*Bill, Rec., p.* 5, *fol.* 9), is wholly unsustained by proof, and the record of the mortgage was notice to all the world. The charge of usury was abandoned. It never had any foundation (*see* 35 N. Y., 65; 33 *ib.*, 665).

Fourteenth Point.—The decree of the Circuit Court, reversing the decree of the District Court, and directing a sale of the mortgaged premises and the application of the proceeds of the sale to the payment of the mortgage debt, was right, and should be affirmed, with costs.

WILLIAM ALLEN BUTLER,
GEORGE F. COMSTOCK,
Of Counsel for Appellee.

NOTES OF THE ARGUMENT

OF

GEORGE F. COMSTOCK.

The learned judge at the District Court, correctly assuming that the Kerosene Oil Company could not mortgage its estate except for its own account and benefit, *i. e.*, for its own debt, decided that the mortgage on its face imports that it was given for the individual debt of A. M. Cozzens, represented in his bond of the same date, and was therefore void. But this conclusion was not justified by the facts of the case, and the learned judge at the Circuit Court, upon a full review of the transactions which gave rise to the mortgage, correctly held that the debt secured by the mortgage of the Kerosene Oil Company was its own debt, properly charged on its real estate by the mortgage executed by its officers under the express authority of its Board of Trustees and with the written consent of stockholders as required by the New York Statute.

I.

Looking at the mortgage, we find that it begins with a recital that Cozzens had been duly authorized by a resolution of the Board of Trustees of the company to borrow $100,000, and to secure the loan by mortgage (*Rec., p.* 161). It then refers to the bond of Cozzens, as given to secure advances to him, and proceeds to

convey the real estate, upon condition to be void *if the company its lf* (not Cozzens), shall pay the moneys mentioned in the condition of the bond. The apparent meaning of all this is that the company wanted money; had authorized Cozzens, its president, to borrow it on the mortgage of the company; that he had borrowed or was about to borrow it; had given or was about to give his own bond for the sum, and therefore that the company gave its mortgage. In all this there is nothing inconsistent with the fact or assumption that the dealing of the lender was with the company, through its president. The individual bond of the president is not necessarily a conflicting fact. A corporation needing money, resolves to borrow it, and to give a mortgage. The president or any other officer may give his private obligation to the lender; and the mortgage, very naturally, will be conditioned on payment of the bond. In such a case the individual bond will, or at least it may, stand for and represent the loan to the company.

We may look at it as a private instead of a corporate dealing. A holds the bond of B, and the mortgage of C, with condition *that C shall pay the bond.* Assuming that we know nothing else about the transaction, what does it mean? The bond and the mortgage, although made by different persons, represent one and the same debt. But whose debt? Has C mortgaged his estate to secure the debt of B, or has B given his personal obligation to secure the debt of C? There may be a *prima facie* meaning one way or the other. But the settled rules of evidence will allow the true nature and intent of the transaction to be shown. Outside of written instruments, it can always be shown who among the parties bound is the principal and who the surety. (*Barry* v. *Ransom*, 12 N. Y., 462.)

But in the case put, suppose that the mortgage of C recite that he had wished and intended to borrow $100,000; that B has given his bond to A for $100,000, and *therefore* mortgages his estate, with condition that he shall himself pay the money. We insist the

prima facie meaning would be that C is the primary debtor, and that B has bound himself for A's benefit. If not so, then certainly the fact can be shown, on the ground that the instrument looks equally in both directions.

There is another rule of evidence and law entitled to decisive influence in this case. That rule is that all the writings relating to the transaction or dealing which may be in question, must be brought together, read and interpreted, in order to ascertain the true and the whole intent of the parties. (*Greenleaf on Ev., sec.* 283.)

To this rule we may add another equally well settled, which is, that in the interpretation of all language, written as well as oral, we may and must look at the situation and relations of the parties and the surrounding and attending circumstances. (1 *Greenleaf*, sec. 282; *Blossom* v. *Griffin*, 13 N. Y., 569; *Brick* v. *Brick*. 98 U. S. R., 514; *Peugh* v. *Davis*, 96 U. S. R., 352.) We have then, in this case, the following writings, and the following surrounding and attending facts:

1. The Kerosene Oil Company and A. M. Cozzens were in reality identical, although technically and formally different, Cozzens really owning all the stock, although a few shares stood in the name of others in order to maintain, in form, a corporate organization.

2. Cozzens was the agent of the company in a universal sense, having the absolute control of all its affairs, so that what he said and did professing to bind the company, bound it, subject, we admit, to the statutory necessity of complying with certain forms in order to create a valid mortgage.

3. At the times when the advances now in question were made, the Oil Company was indebted to Cozzens in a sum greater than the advances. The company

needed the advances in order to reimburse Cozzens for funds advanced by him to carry on its business. Being largely a creditor of the company, it was impossible or inconvenient for him to advance unless thus reimbursed. In real fact he was the company, and the need of the company to raise money was his need also.

4. The company, through Cozzens, made application to the defendants for a loan of $100,000, and received at the time $50,000, delivering to the defendants, at the same time, *the company note* for that sum, and promising to give its mortgage, this promise being in writing distinctly importing on its face that the $50,000 was then loaned *to the company*, and that the future advance or advances would be made *to the company*, (*p* 86).

5. The transaction last stated occurred February 15, 1867, and considered by itself, would prove precisely and conclusively a present loan, and a future contemplated loan or loans to the company on the promise of its mortgage, the present loan being represented by its own note.

6. But there was another and contemporaneous fact, to wit: A special agreement of Cozzens, of that same date (Feb. 15), *which considered by itself*, would make the transaction appear as though Cozzens, *owning the note of the company*, pledged it to the defendants to secure an advance of the $50,000 to him, promising, however, *for the company*, to give its mortgage to secure the payment of such advance. (This original special agreement was in the form of the one printed on page 169 of the record, which is a renewal of it.)

Thus we have two writings, either of which, considered by itself, in technical meaning, is inconsistent with the other. But both were signed at the same time, related precisely to the same subject, and were assur-

ances for the same debt then created. The one imports a loan made to the company on its note and a promise of its mortgage, and a future loan to be made in like manner. The other, by itself, imports a loan of the same $50,000 to Cozzens on his pledge of the note as *his property.*

7. Next in date after the foregoing facts is the authority to give such a mortgage, by resolution of the directors, passed March 9, 1867 (*p.* 185, *at foot*). This is recited in the mortgage itself, as well as the authority to borrow the $100,000. This was followed by the formal written assent of two-thirds of the stockholders, to wit: The assent of A. M. Cozzens, who signed for $493,800 of the $500,000, which was the total stock of the company (*p.* 175). This assent was given April 27, 1867, and it precisely sets forth that the mortgage was to be given to the defendant to secure the "*debt of the company contracted and to be contracted.*"

8. Of the same date is the mortgage in question, and the individual bond of Cozzens, expressed to be given to cover advances of money to $100,000 or any less amount to be made by defendants to him, any such advance to be endorsed on the bond, and the bond also referring to the mortgage as being given to secure the same advances. (*Mortgage, p.* 164; *bond, p.* 166.)

9. The original transaction of loaning the first $50,000, February 15, 1867, on the note of the company, and promise of the mortgage, was closed on the 11th of May, 1867, *when the note was renewed* and the mortgage was actually delivered, with the individual bond of Cozzens. The sum covered by the new note was endorsed on the bond as an advance to Cozzens. It was simply a narration of the original loan. (*See evidence, pp.* 90, 91, *and endorsement on bond, p.* 167.) This note was renewed more than once, and the last renewal is *now held by defendant.* At each renewal of the com-

pany's note, the special agreement of Cozzens, already referred to, was renewed in the same form. Thus we find two obligations for the same advance when first made, and the same obligations perpetuated to the present time. The company is and always has been bound for the advance, and has given its mortgage. Cozzens is and always has been bound for the same advance, and has given his bond.

10. As originally contemplated, a further advance of $25,000 was made May 18, 1867, *the note of the company*, for that sum, being at the same time delivered by Cozzens to the defendant to represent such advance. This advance was in like manner endorsed and receipted by Cozzens on his bond. (*See evidence, p.* 91, *and endorsement on bond, p.* 167.) Cozzens also gave his special agreement in relation to this advance in the same form as the one relating to the first advance of $50,000. (*The form, at p.* 170, *is a renewal of this agreement.*) This note was also renewed, and *the defendant now holds the last renewal.*

11. The next and last advance was $25,000, on the 22d of June, 1867, upon a warehouse receipt for oil valued at $40,000, given by the company *subject to the order of the defendant*, and which the company undertook to deliver but never did deliver. (*See evidence, p.* 91, *fol.* 161; *also p.* 92, *fol.* 162, *and warehouse receipt, p.* 167, *fol.* 296). This advance was also endorsed on the bond of Cozzens, and receipted by him. (*See endorsement, p.* 167.) In relation to this advance Cozzens signed a special agreement in the same form as in relation to the prior advances.

12. It is proved explicitly, and not denied, that all the advances, from first to last, were made by defendant on the faith of the mortgage (*pp.* 91, 108, *fol.* 191).

13. Cozzens, the president of the company, and in fact the *company itself*, received all the advances and *used them in the business of the company.*

Thus we have a connected and continuous transaction, which, in its different parts, has more or less of incoherence when tested by technical and exact legal principles. Yet it is a necessity of the case to find a single conclusion to which inconsistent circumstances must yield. On the one hand, the defendant holds an individual bond of Cozzens for $100,000, and his acknowledgement endorsed thereon for the several advances as made to him. His personal promise to repay these moneys is also included in the peculiar and special agreements which he signed as each advance was made. Looking just so far only, it would be easy to say that Cozzens had borrowed, in all, $100,000 on his own bond and his own promises to pay. But, on the other hand, we know there was only one borrowing—one debt. For this same debt the defendant holds the unquestionably valid obligations of the company taken at the time of each advance or in renewal of those then taken; also the mortgage of the company to secure the debt represented (as one debt), by their own notes as well as by the bond of Cozzens—the mortgage being conditioned *that the company shall pay the advances* as the same are referred to in the bond. The same mortgage recites that on the 9th day of March, 1867 (that being the original date of both bond and mortgage, afterwards altered to April 29), the company *had authorized Cozzens, its president, to borrow the* $100,000 *and to execute the mortgage*. We know also that the whole transaction had its root in the urgent need of the company to raise money, the true meaning of which is, that it had need to place in funds its president, who was largely its creditor, who was its universal agent and factor, and by whom all its moneys were received and disbursed.

Conceding, then, that there is more or less of inconsistency and ambiguity in the mere written forms of these transactions, and considering all the circumstances stated, especially that the defendant took and now holds the direct written obligations of the company, as well as of Cozzens individually, for the same debt, we

say that the mortgage was intended to secure the debt of the company, and is therefore valid. Undoubtedly the moneys in question were actually received by Cozzens. So were all moneys of the company, and these particular sums went immediately into the bank account, in which were kept all the moneys of the company. The conclusion stated should be adopted without hesitation, if we can find no other way of upholding these dealings according to the true intention of the parties.

II.

But we shall find less of difficulty if we take the complainant's own version of the facts. The complainant concentrates his view upon the individual bond of Cozzens and his special agreements to repay the advances made cotemporaneously with each advance (although the company at the same time gave its own obligations also), and he insists that all this shows the loans to have been made to Cozzens on his promise to pay them with a *pledge* of the company obligations to secure them, and with a promise of the company to give a mortgage—performed by actually giving it. We will accept this view of the case, *adding the undisputed facts that the notes of the company which he delivered to the defendant, and the warehouse receipt on which the last advance of* $25,000 *was made, represented moneys actually owing and due to Cozzens from his company.*

Now the assumption on the part of the complainant is, that in order to create the debt which the mortgage could lawfully secure, the direct relation of borrower and lender must have existed between the company and the defendants. *This is the fundamental mistake.* The statute only requires that the mortgage must represent a debt of the company "contracted in the business for which it was incorporated." Therefore it matters not how the debt was contracted. The

only questions are, does the company owe the debt on its own account (not as security for some third person), and does the mortgage secure it? The inquiry admits of a very simple illustration. A holds the note of B for the debt of B to himself, and transfers the note, by way of pledge, to C to secure a loan or advance to himself. Thus C becomes the holder of the note, and B, the maker, must pay it to C, the transferee. Then B gives his mortgage to C to secure the payment of his own note. The mortgage of B would plainly stand for his own debt as represented in the note. Yet there would be no direct loan from C to B, and the note might be given, not for money at all, but for any lawful consideration arising in the business relations of A and B.

And such was precisely the dealing in this case if the complainant is correct in his assumption that the loans were to Cozzens instead of the company. In that view of the facts, Cozzens, holding the valid obligations of his company *for its indebtedness to him*, transferred them to the defendant, received the advances thereon, and bound himself to repay them by his cotemporaneous written agreements, and ultimately gave his bond for the same purpose. Thus the defendant became the pledgee and transferee of the company's obligations given on its own account, and the company could lawfully and did lawfully secure the payment of those obligations by its mortgage. And thus we see the defendant has two debtors for the same debt or sum of money. First, Cozzens is its debtor, because he borrowed the moneys and bound himself to repay them, transferring as security the debt owing by the company to him. Second, the company was a debtor because it indisputably owed the debt so transferred. Where, then, is the doubt that it could give the security of a mortgage on its real estate?

Therefore, according to the complainant's own version and construction of the facts, the central and vital proposition is that the company owing a debt

represented by its obligations thus transferred, gave its mortgage to secure such debt to the defendant as the transferee and holder. Everything else in the case is circumstantial and accessory, falling in with this main proposition, and all the details which impart a certain degree of complexity to the dealing may be paraphrased as follows :

Cozzens, the individual, says to Cozzens the company, you are in need of money and owe me, your universal factor and agent, a large sum. I cannot go on with your business without means. Give me now your note for $50,000, for part of what you owe me. You will need $100,000 in all, and you can give me other notes or obligations on the same account when wanted. I will raise the money on these notes, it being understood that you shall also give a mortgage to secure them. With that security I can find the money. To all this the company (represented by Cozzens himself) assents, and the first note of $50,000 is given accordingly.

Cozzens the individual and Cozzens the company then (Feb. 15, 1867), go to the business office of the defendant. [This is true, because, except as to technical and formal requirements which by statute law made it necessary that the directors should meet—wherever Cozzens was, the company was also—by which it is only meant that what he said and did in behalf of the company was said and done by the company itself.] They go to the office of the defendant; Cozzens, the individual, applies for a loan to himself, present, and future, of $100,000; receives the first advance of $50,000, and transfers the company's note to secure it, giving at the same time his special agreement to repay the advance. So far the individual speaks and acts. But inasmuch as the defendant (as was expected) would not lend him the money on that basis alone, Cozzens, the company, then speaks and acts in the form of a written promise to give a mortgage to secure its note then delivered, and to se-

cure also the future obligations it might give, to be used in the same manner, in accordance with the plan agreed on to raise the $100,000.

Next in order the formal requisites prescribed by law were complied with. March 9th, the directors of the company met and passed the proper resolution authorizing the mortgage. Then, March 27, the stockholders (Cozzens) signed, acknowledged and filed the proper consent. Then, about May 11, Cozzens, the company, delivered to the defendant the mortgage, and Cozzens, the individual, delivered his own bond, having on its face a provision that the loans to him shall be endorsed thereon *as received by him*. At this time the first note of $50,000 held by the defendant was renewed, and that sum was so endorsed on the bond as *an advance to him*, thus connecting with the original transaction of Feb. 15. Thus the plan was consummated as to the first advance. Then, May 18, when $25,000 more was needed, Cozzens, the company, gave to Cozzens the individual, its note for another portion of what it owed him, and he procured the second loan on the same basis as the first. The same is true of the third advance (June 22), except that instead of a note the company gave its warehouse receipt, by which it was bound to deliver goods to the company. On this obligation the last $25,000 were advanced to Cozzens, the warehouse receipt on its face declaring that the purpose of it was to raise money.

These successive sums of $50,000, $25,000 and $25,000, as the plaintiff insists, were loaned and advanced by the defendant to Cozzens. So be it. But if so, they were advanced precisely on a pledge of the notes of his company held by him, as to the $50,000, and the first $25,000 transferred to the lenders, and on a like pledge of the warehouse receipt as to the last $25,000, the means by which Cozzens procured these loans being not only the transfer and pledge of these obligations, but the attending and simultaneous promise of the company to secure them by its mort-

gage, followed by actually giving it. At every stage in these transactions we see three parties as the actors, and all acting together: Cozzens, the individual, as the borrower on a transfer and pledge of the obligations of the company; the defendant as the lender, receiving such transfer and pledge. The Oil Company standing by, giving its obligations, and promising to secure the debt by its mortgage, and giving its mortgage. We can find no place to hang a doubt that the mortgage represents and secures the actual *bona fide* debt of the company.

III.

Finally, there are only two modes of viewing the case, which are possible or conceivable, and they both lead to the same conclusion. From one point of observation we see these dealings as taking place directly between the defendant and the Oil Company, and we see Cozzens only as the agent of his company, procuring for it these loans on its own obligations, secured by the promise of its mortgage and ultimately by its mortgage given. Thus we plainly see a debt of the company, although we find the agent binding himself for the same debt by his private obligations also. From the other standpoint we see the relation of debtor and creditor first arising between the company and its universal agent, and represented in the written obligations held by the latter. We then see the agent *individually* dealing with the defendant, receiving the moneys loaned to him individually, but transferring and pledging these written obligations *as his property*. But we also see the company, for whose relief the whole measure was intended, making itself a party to the same transactions by simultaneously agreeing to mortgage its real estate for the advances made and the advances to be made by the defendant as the transferee of its obligations. These obligations represent its own debt, and the mortgage is the security for it.

It is true that the mortgage, on its face, professes to be collateral to the individual bond of Cozzens. But the bond of Cozzens represents the same debt as the obligations of the company itself. The defendant has them both. If the company had paid its own debt represented in its own written promises to pay it, the bond and mortgage would both have been satisfied and discharged. That simple act would have been the consummation and close of all these dealings, and would have consigned them to the category of past transactions, surviving only in their history. The meaning of this is, that the company could not perform the condition of the mortgage in its most literal sense, without, by the same act, paying its own admitted debt to the defendant, and therefore it must be true in all possible and conceivable points of view, that the mortgage is a valid instrument. We repeat, there can be only these two modes of viewing the case. The defendant either received the written obligations from the company (through Cozzens, as its agent), or else discounted them for Cozzens, as the owner of them. There is no middle or other ground, and under either alternative they were secured by the mortgage. Which ever road we take we arrive at the same point.

99-101